

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF  
The State of Missouri,  
AT THE  
OCTOBER TERM, 1877.

*(Continued from Vol. 65.)*

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THE STATE V. WIENERS, APPELLANT.

1. **Murder in the Second Degree** is the wrongful killing of a human being with malice aforethought, but without deliberation. It is where the intent to kill is, in a heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside.

**Heat of Passion.** This phrase is here used, not in its technical sense, but to denote a condition of mind contra-distinguished from a cool state of the blood.

**Malice: MALICE AFORETHOUGHT.** Malice is the intentional doing of a wrongful act without just cause or excuse. As an element of the crime of murder malice aforethought signifies that the homicide has been intentionally committed with malice.

**Deliberation** does not mean brooded over, considered, reflected



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upon for a week, a day or an hour, but it means an intent to kill, executed, not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose.

2. **Case adjudged.** It having been clearly proven that defendant killed deceased intentionally, that there was no excuse or justification for the killing, that the provocation given by deceased was slight, and that deceased explained and apologized to defendant for it, it was held that it was not a case requiring instructions to be given to the jury defining murder in the second degree, and there being no complaint against the instructions in regard to murder in the first degree given by the trial court, the judgment of conviction was affirmed.
3. **Practice.** Neither the act of the prosecuting attorney in conferring with a witness for the defense, in relation to the case, nor his statement in argument to the jury that the murder was admitted by defendant were held, in the present case, sufficient to justify a reversal of the judgment.
4. **Evidence:** THE BONES OF THE DEAD MAN may be exhibited in evidence upon a trial for murder, for the purpose of showing to the jury the attitudes and relative positions of the deceased and defendant, when the fatal shot was fired.

*Appeal from St. Louis Court of Appeals*

*Boyle & Delehanty* for appellant.

1. The circuit court erred in omitting to charge the jury as to murder in the second degree. Wag. Stat. 1106, § 30; *Hardy v. State*, 7 Mo. 609; *State v. Matthews*, 20 Mo. 55; *State v. Byrne*, 24 Mo. 155; *State v. Schoenwald*, 31 Mo. 147; *State v. Bryant*, 55 Mo. 75; 12 Ga. 142; *Foster v. People* 50 N. Y. 601; *Com. v. York*, 9 Met. 94, 115; *Gardiner v. People*, 6 Park. Cr. Rep. 190; 16 N. Y. 61; Lead. Crim. Cas. (2 Ed.) 332; 2 Black. Com. (Shars. Ed.) 198; *Bratton v. State*, 10 Humph. 110; *Robbins v. State*, 8 Ohio St. 169; *Atkinson v. State*, 20 Tex. 531; Numbers Ch. 35; Deuteronomy Ch. 19; *Bower v. State*, 5 Mo. 380; *Com. v. Crause*, 4 Clark (Penn. L. J.) 503; *Fouts v. State*, 4 Green. (Iowa) 500; *Territory v. Stears* 2 Mont. 324; *Craft v. State*, 3 Kan. 451; *Bivens v. State*, 11 Ark. 455; *Fahnestock v. State*, 23

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Ind. 231; *People v. Batting*, 49 N. Y. 398; *State v. Ingold*, 4 Jones 222; Whart. Am. Law of Hom. 369; *Shoemaker v. State*, 12 Ohio 44, 53; *Com. v. McEwen*, 1 Clark (Penn. L. J.) 140.

2. The bones of the deceased and the bullet found imbedded therein were not proper evidence, and should not have been exhibited to the jury. It has been an immemorial usage in criminal trials in this country and Great Britain, to introduce in evidence skulls, bones, clothing, etc., of a deceased person where the *corpus delicti* is in doubt; but we have yet to find a single case or principle, after diligent research, sustaining the production of such evidence when the killing is admitted, as charged in the indictment, and more especially as in the case at bar, when the coroner witness indicated the precise location of the wound and direction of the bullet, on the neck of the presiding judge in the trial court. Steph. Dig. Ev. Art. 140; *State v. Brown*, 1 Mo. App. Rep. 87; *State v. Holme*, 54 Mo. 160; *Clark v. Vorce*, 19 Wend. 232.

3. The *ultra* professional conduct of the circuit attorney in conferring before the trial with Crum, one of the witnesses for the defense, worked a surprise upon defendant's counsel, and prejudiced defendant. Gra. & Wat. on New Trial 874, 875 and note; *Ibid* 1009; Hilliard on New Trial (2 Ed.) 521, 544; *Todd v. State*, 25 Ind. 213; *Phillips v. State*, 29 Ga. 105; *Peers v. Davis*, 29 Mo. 184; *Carey v. King*, 5 Ga. 75; *Com. v. Benesh*, Thatch. Crim. Cas. 687.

4. The statement of the circuit attorney in his argument to the jury that defendant admitted the murder, prejudiced defendant upon the trial, and is sufficient ground for a reversal. 2 Broom & Had. Com. 486; *Gould v. Moore*, 40 N. Y. 395; *State v. Kring*, 64 Mo. 591; *State v. Reilly*, decided by the St. Louis Court of Appeals (1877); *Sullivan v. People*, 31 Mich. 4; *Jenkins v. N. C. Ore Dres. Co.* 65 N. C. 564; *Devries v. Haywood*, 63 N. C. 53; *Com. v. Smith*, 30 Leg. Intell. 201, (160); 1 Bright. (Pa.) Dig. 506.

*J. L. Smith*, Attorney-General, for the State.

1. The criminal court did not err in refusing to instruct the jury as to murder in the second degree. The testimony shows clearly that the homicide was committed under such circumstances as to constitute the crime of murder in the first degree, and no other, and the criminal court therefore very properly, by its instructions, confined the attention of the jury to that grade of homicide. *State v. Lane*, 64 Mo. 319; *State v. Foster*, 61 Mo. 549; Wag. Stat. p. 445, §§ 1, 2; *State v. Schoenwald*, 31 Mo. 147.

2. The criminal court did not err in overruling the motion for a new trial on the ground, as therein alleged, of surprise. Because if the witness Crum had testified to every fact stated in the affidavit and motion in relation to previous threats of the deceased, and the defendant and other witnesses had testified that such threats had been communicated to defendant previous to said homicide, still such testimony could not have been admitted, or, if admitted, would have been excluded, for the reason, that the testimony of all the witnesses shows that defendant, by his own voluntary conduct, sought the difficulty in which deceased was killed, and that the defendant was the sole aggressor therein. *State v. Hays*, 23 Mo. 287; *State v. Brown*, 63 Mo. 439.

3. The criminal court did not err in admitting the testimony of the coroner and the exhibition of a portion of the vertebral column of the deceased. *Gardiner v. People*, 6 Parker Crim. R. 155. (See page 200.)

*L. B. Beach*, Circuit Attorney, for the State.

1. Is there any element of murder in the second degree in this case? If there is not, then the court was right in confining the attention of the jury to murder in the first degree. An inspection of the evidence will show this case to be a clear case of murder in the first degree,

without an extenuating or justifying circumstance, without palliation or excuse. The indictment is for murder in the first degree, and is founded on paragraph 1, article 2, Wag. Stat. 445. Now, what is the legal meaning of the words used in this section as applied to this case? Willfully, means intentional, that is, not accidental. Deliberately, means in a cool state of the blood, that is, not in a heat of passion caused by a lawful provocation. Premeditatedly, means thought of beforehand, any length of time however short. Provocation to be sufficient to mitigate or extenuate homicide, as applicable to this case, should amount to personal violence or injury to the defendant—mere words of reproach, however abusive, degrading or grievous they may be, are no provocation sufficient to free the party killing from the guilt of murder

This was a willful, deliberate and premeditated killing without lawful provocation. Defendant and deceased were both employed at the Theatre Comique in the city of St. Louis, defendant as private watchman and deceased as assistant barkeeper. Defendant in size, was almost a giant, being in height at least six feet, and weighing between 200 and 225 pounds. Deceased was almost a child as compared with defendant, weighing only about 120 pounds, and being only five feet high. The bar where deceased was employed, was down stairs, and the theatre up stairs, and also back of the bar. Some one called at the office of the theatre for defendant, and no one else being handy, deceased was ordered to go up stairs and inform defendant that he was wanted at the office, which errand was duly performed by deceased. Defendant then came down, and having found that he had been called down in consequence of some person having called whom he disliked, he at once went into the bar where deceased was attending to his duties, and commenced upbraiding and calling deceased low names, for having called him down. Deceased said that he was not to blame, or could not help

it, as he did not know who had called, and had simply obeyed orders in going up and informing defendant that he was wanted at the office. Deceased, during the conversation in question used towards defendant some of the low names that defendant was using towards him. All this time defendant stood on the outside of the counter, and deceased behind the counter attending to his duties. Defendant then pulled out his pistol and tried to shoot the deceased, saying at the same time, "You God damned son of a bitch, I will kill you," and would undoubtedly have done so, but for the interference of friends. Up to this time, deceased, in no manner, shape or form, had given any provocation to defendant. Then some minutes afterward defendant still being on the aggressive, and calling deceased low names, reached over and struck deceased a blow in the face with his fist, and then, and not till then, did deceased do anything to protect himself. While smarting under the blow, he simply reached down and picked up an ordinary soda-water bottle, but did not use it. Almost immediately after defendant had struck deceased, he, defendant, drew his pistol and tried to shoot deceased, and two friends were unable to hold him, for he slips around his left hand and shoots the deceased dead upon the spot. Deceased had no weapon upon him, nor did he throw the bottle, but simply stood upon the defensive at the mercy of the defendant, who was seeking his life. Defendant immediately fled, remarking as he ran, "the God damned son of a bitch." There was no personal violence or injury to defendant. His life was not menaced or in danger; no one was fussing with him; no one attacking him; he was on the scene by his own free and voluntary act; he was using all the violence and threats; before he shot, he had committed an assault to kill, which of itself is a felony, and then he had followed that up by a battery on deceased; he was seeking a difficulty and urging it upon the deceased, only endeavoring to draw his victim into some overt act. From the time he first endeavored to shoot the deceased,



to the time that he actually did shoot him, some fifteen minutes elapsed; he had ample time then to deliberate; he had had no lawful provocation, no lawful heat of passion, and therefore the act was deliberate.

Defendant did not ask for an instruction upon the second degree. The bill of exceptions, the evidence, the affidavit for a continuance, the affidavits of the defendant's counsel, all show that the only defense set up and pleaded was self-defense. Defendant's counsel announced all through the trial that their plea was self-defense. To use their own words, as will be seen in the record: "We admit the killing, but claim that it was done in self-defense."

2. It is claimed by defendant's counsel that the vertebral column ought not to have been exhibited to the jury, because "they had admitted the killing in manner and form as charged in the indictment." The State had the right to submit all the facts to the jury, the time, the place, the circumstances, and every fact tending to show all the elements of murder in the first degree. The officer of the State must be the one to judge as to the State's theory. In a case of murder in the first degree, it is proper for the State to show all the surrounding circumstances, the place of the murder, the difference in the sizes of the two men, the size of the pistol, the size of the bullet, the position of the parties, where the deceased was shot, whether in front, side, or back of the neck. Defendant claimed at the trial that the act was done in self-defense; then was it not proper for the State to show that the deceased was shot, not in the front of the neck, but towards the back, thereby showing the position of the parties at the time?

• HENRY, J.—The defendant was indicted for the murder of Americus V. Lawrence, and convicted of murder in the first degree. On the appeal to the St. Louis Court of Appeals, the judgment on that verdict was affirmed, and he has appealed to this court.

The principal ground of complaint is that the court

failed to instruct the jury in regard to murder in the second degree. It is difficult to determine under our statute and decisions what is murder in the second degree, and the difficulty is attributable in part to the misapplications of the terms "malice" and "premeditation," and partly to those sections of the statute defining manslaughter in the four degrees. "Malice" and "premeditation" have been properly defined by this court, but have been misapplied in the discussion of this question, by a failure to observe the particular features of the cases in which this court has applied those terms, as defined. "Malice is the intentional doing of a wrongful act without just cause or excuse." This definition is open to verbal criticism, for the intentional doing of a wrongful act is necessarily without just cause or excuse, for otherwise it would not be a wrongful act; so that those words are superfluous. It is also open to criticism as applicable to homicides. Take the case of an intentional killing at common law which the provocation, although not justifying or excusing, reduced to manslaughter. "It was a wrongful act intentionally done without just cause or excuse," and by this definition it was malicious, and having been intentionally committed, contained all the elements of murder at common law; yet we know that there were at common law inexcusable and unjustifiable homicides intentionally committed, which were but manslaughters. Lord Hale's definition of malice in fact "is a deliberate intention of doing any bodily harm to another whereunto by law he is not authorized." Hale's Pleas of the Crown, I Vol. 450. Malice is a condition of the mind, the existence of which is inferred from acts committed or words spoken. It is that condition of the mind which "shows a heart regardless of social duty and fatally bent on mischief." To constitute a killing murder there must be malice aforethought, not that the malice should be thought of beforehand, which would be absurd, as it is but a condition of the mind, but that the act, prompted by this malice, should be thought of before, and



it signifies properly a homicide, intentionally committed with malice. If one with malice assault another to chastise, and unfortunately kill him, unless there was an intention to kill, express or implied by law from the instrument used, or the nature of the chastisement inflicted, there could be no malice aforethought as to the killing, which was not in the contemplation of the party. To constitute murder, the killing must be with malice aforethought, that is, "an unlawful intention to take life must precede the killing."

It is impossible to construe properly the first and second sections of our act in relation to murder without a knowledge of the common law in regard to murder and manslaughter. Murder was thus defined by Sir Edward Coke, 3 Inst. 47: "Where a person of sound memory and discretion unlawfully killeth any reasonable creature, in being and under the king's peace, with malice aforethought." Manslaughter was the unlawful killing of another without malice express or implied. "Manslaughter, which is principally distinguishable from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionably lenient." [East's Pleas of the Crown, 1 Vol. 218.] Sec. 1. Wag. Stat. page 445, defines murder of the first degree, as follows: "Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglarly or other felony." By section 2: "All other kinds of murder at common law, not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree." The word malice is not used in either section, but is in-

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cluded in the term murder, and malice must exist before any homicide can be declared murder in either degree. Can there be malice aforethought when there is no intention to kill? There are cases at common law with which apparently the doctrine that an intent to kill is of the essence of murder is in conflict, but the conflict is only apparent. If one in perpetrating or attempting to perpetrate a felony, kill a human being, such killing is murder, although not specifically intended, for the law attaches the intent to commit the other felony to the homicide. The law conclusively presumes the intent to kill. "If a person breaking an unruly horse willfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder. For how can it be supposed that a person willfully doing an act so manifestly attended with danger, especially if he showed any consciousness of such danger himself, should intend any other than the probable consequences of such an act? But yet, if it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, it is only manslaughter." [East, 1 Vol. 231.] The cases of the unnatural son who exposed his sick father to the air against his will, by reason whereof he died—of the harlot who laid her child under the leaves in an orchard, where a kite struck and killed it—of the man who had a beast that was used to do mischief, if he purposely turned it loose, though barely to frighten people and make sport, and it killed a person—of the workman who threw down a stone or piece of timber into the street in a populous town, where people were continually passing, and killed a person, were murders, for the law presumed the intent to kill, or rather held that the parties intended the probable consequences of their acts. These cases are considered in East's Pleas of the Crown, under the head of homicide from a general malice or depraved inclination to mischief, fall where it may, in which cases the intent to kill is presumed. "The

act itself must be unlawful, attended with probable serious danger, and must be done with a mischievous intent to hurt people in order to make the killing amount to murder in these cases, for it is from these circumstances that the malice is to be inferred." "But if an unlawful and dangerous act, manifestly so appearing, be done deliberately, the mischievous intent will be presumed, unless the contrary be shown." [Vol. 1, 231, see also 235, 236.]

In every case of murder at common law there was an intent to kill either express or implied, and where all the circumstances showed, when the intent was not conclusively presumed, that no such intent existed, the homicide, if not justifiable or excusable, was but manslaughter. A and B, acquaintances, between whom no trouble has occurred and no ill-feelings exist, stand talking on the street. A tells B that he lies; B, with a heavy stick, the use whereof will not probably result in death, with no intention to kill, strikes A upon the head and kills him. Blackstone and East say that the crime of which B is guilty is *manslaughter* and not *murder*. "Words of reproach, how greivous soever, are not provocatives sufficient to free the party killing from the guilt of murder, nor are contemptuous or insulting actions or gestures without an assault upon the person, nor is any trespass against land or goods. This rule governs every case where the party killing, upon such provocation, made use of a deadly weapon, or otherwise manifested an intention to kill, or to do some great bodily harm. But if he had given the other a box on the ear, or had struck him with a stick, or other weapon not likely to kill, and had, unluckily, and against his intention killed him, it had been but manslaughter, for no malignant intention can be collected from such acts." East's Pleas of the Crown, vol. 1, page 233. To the same effect is Blackstone's Com., 4 vol., 201.

As the above supposed case was but manslaughter at common law, it, of course, could not be murder in either degree, under our statute. On page 256, 1 East's Pleas of

the Crown, a case is stated seemingly in conflict with all the cases cited, and with the doctrine maintained by him, thus: "He who voluntarily, knowingly and unlawfully intends hurt to the person of another, though he intends not death, yet he is guilty of murder or manslaughter, according to circumstances, if death ensue. As if A intending to beat B, happen to kill him, if done from pre-conceived malice or in cool blood upon revenge, it will be no alleviation that he did not intend all the mischief that followed." But he immediately qualifies it so that it harmonizes with the other cases put by him and with his own doctrine, thus: "But the nature of the instrument and the manner of using it as calculated to produce great bodily harm or not, will vary the offense in all such cases." If the beating, however wrongful, was neither with a deadly weapon nor carried to a degree evidently dangerous, and there was no intent to kill, but unfortunately death followed, the offense would amount only to manslaughter. [Bishop's Criminal Law, vol. 2, sec. 623.] "Is the act both wrongful and in its nature dangerous to life? This, in a large class of cases, is the test. Thus, when the defendant is willfully committing a mere criminal misdemeanor; yet if the misdemeanor is one endangering human life, the accidental causing of death is murder." [Bishop, 2 vol., sec. 617.] In section 718 the same learned author says: "The doctrine of these cases does not wholly exclude considerations of the intent. If the act were not calculated directly to be dangerous to life, yet if it were done with the motive of committing a misdemeanor, the offense would be manslaughter." But it is unnecessary to extend this discussion. As there can be no murder without malice, express or implied, so there can be no murder without an intention to kill, express or implied. This proposition we think fully sustained by the authorities cited. See also *The People v. Austin*, 1 Parker's Crim. Reports, 162.

What, then, is murder in the second degree? It is the wrongful killing of a human being with malice aforethought

but without deliberation. It is, where the intent to kill is, in a heat of passion, executed the instant it is conceived or before there has been time for the passion to subside. We do not use the phrase, "heat of passion" in its technical sense, but as a condition of mind contra-distinguished from a cool state of the blood. Take the case of A and B, who had been on friendly terms, but they have an altercation in which A calls B a liar, and with a pistol or other deadly weapon B instantly, in a passion engendered by the insult, kills him. This, at common law, was murder, but, lacking the element of deliberation, it is, under our statute, murder in the second degree. At common law there were instances of provocations not amounting to an assault upon the person which extenuated the guilt of homicide, "or, to speak more properly, they serve to explain the act and rebut the presumption of malice." East, 1 Vol. 235, where instances are given. See also *United States v. Wiltberger*, 3 Washington Circuit Court Rep., 521. Premeditation means thought of beforehand, even for a moment, and as an intent to kill must be preceded by an operation of the mind which produced that intent, it is argued plausibly that every intentional killing which is not excusable or justifiable must be murder in the first degree, because the malice exists if the act was without excuse. But this argument overlooks the consideration that not only premeditation, but malice aforethought and deliberation are necessary elements of murder in the first degree. Murder in the second degree is such a homicide as would have been murder in the first degree if committed deliberately, but having been committed in a passion, in obedience to a sudden impulse, engendered by a real or supposed grievance, and not for gain or pre-existing revenge, the law, out of consideration for the weakness of human nature, esteems it as a crime of lower grade than such willful, deliberate homicides, as in common parlance are denominated cold-blooded murders. "Premeditation" and "deliberation" are not synonyms, and a homicide may be premeditated with-



out being deliberately committed. "Malice aforethought," says Bishop in his Criminal Law, "is a technical phrase employed in indictments, and with the word *murder* distinguishes the killing called murder from what is called manslaughter." When our statute declares that "every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, &c., shall be murder in the first degree," it certainly meant that the "other kind of willful, deliberate and premeditated killing" should be of the nature of that perpetrated by lying in wait or by poison of the same willful, deliberate and premeditated character. The common law made no distinction betwixt the guilt of the poisoner, or the assassin who shot his victim from ambush, or the robber who killed for gain and the man who under the influence of a momentary passion engendered by a real or supposed grievance, on the instant that the insult or provocation was given, slew the supposed aggressor. The common sense of mankind makes a distinction and regards the poisoner and assassin with abhorrence and loathing, but while condemning the act of the man who slays in passion without sufficient cause, regards him as far less criminal than the man who murders for gain or poisons or assassinates for revenge. To this common sentiment of mankind our legislature has yielded and distinguished between such murders.

As was said by the supreme court of Kansas in *Craft v. The State of Kansas*, 3 Kansas 451, speaking of the provisions of the statutes of that state similar to ours: "To constitute murder at common law there must be malice pre-pense or aforethought, i. e., *an unlawful intention to take life must precede the killing*. But 'deliberation and premeditation' were not necessary ingredients. The same penalty was provided for killing with malice aforethought, that was inflicted for malicious, deliberate and premeditated killing. The law recognized no degree of atrocity in the crime. The law-makers of this state, as did those of other

states, thought they ought to recognize some difference in the degree of malignity with which the killing was done, and upon that basis they undertook to divide murder at common law into two degrees, so that the punishment might, to some extent, be proportioned to the moral depravity manifested in the commission of the crime." Of murder in the second degree are also all those cases of murder at common law, in which there was no specific intention to kill, but the law presumed the intent to kill, which are not declared manslaughter in one of the four degrees by our statute, and not committed in perpetrating or attempting to perpetrate a felony, as provided by the first section of the statute.

Applying these principles to the case under consideration, should the court have instructed as to murder in the second degree? If the killing was deliberately done it was murder of the first degree. In every homicide, however great the provocation may be, if there be sufficient time for passion to subside and reason to interpose, it will be murder in the first degree. "The law assigns no limits within which the cooling time may be said to take place—every case must depend on its own circumstances." A purpose to kill may be conceived and deliberately executed, although but a very brief time elapse between the conception and the execution of the purpose. Deliberation does not mean brooded over, considered, reflected upon for a week, a day or an hour, but it means an intent to kill, executed by the party, not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design, to gratify a feeling of revenge or to accomplish some other unlawful purpose. It is no easy matter to draw the line of distinction betwixt premeditation and deliberation. It is more easily conceived than expressed. Instances are more satisfactory than definitions.

The facts, as disclosed by the testimony here, are that prior to the 29th day of January, 1877, the defendant and



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the deceased were on friendly terms: that about 11 o'clock on the night of that day they quarreled in a saloon, in which deceased was a bar tender, but what was the occasion of that quarrel does not appear. Between 12 and 1 o'clock the principal bar tender of the saloon adjoining the theater Comique in St. Louis sent the deceased, who was his assistant, up stairs, to call Wieners down; Wieners was a private watchman employed at that theater. The evidence does not show what occurred between Wieners and Lawrence up stairs, but Lawrence returned to the saloon, followed by Wieners, who appeared to be angry. They quarreled, each applied to the other approbrious epithets. Wieners drew a pistol, and cursing the deceased threatened to kill him, but he was seized by a bystander and induced to put back his pistol, and agreed to go home. The altercation continued and Wieners struck Lawrence a blow on the cheek—one witness says with his open hand—another that it was with his fist, but whether with his open hand or fist, it did not fell or stagger Lawrence, and was evidently a very slight blow. Lawrence reached down under the counter and brought up in his hand a soda water bottle and was in the act of throwing it at Wieners when the latter, who had drawn two pistols, holding one in each hand, shot Lawrence with the pistol he held in his left hand, being prevented from using the right by Litsch, who had hold of him. Soon after the parties commenced the quarrel, Lawrence told the defendant, in explanation of his going to call him down, that he did it in obedience to orders given by the head bar tender. The provocation given by deceased was slight, and his explanation, which was, in effect, an apology, should have been accepted by defendant as satisfactory. The fixed purpose of the defendant to kill Lawrence is apparent, and a circumstance, which of itself, is conclusive that the killing was not done under the influence of uncontrollable passion is the character of the blow given by him on the cheek of Lawrence. Why was such a blow given? One in a towering passion such as will

mitigate a homicide does not measure the force of his blows. Wieners was a powerful and Lawrence a very diminutive man. With his fist he could have felled him; and the manner in which that blow was given, in the light of what afterwards occurred, evidenced a purpose on the part of defendant to provoke Lawrence to some act of aggression and then take his life, as announced by previous threats. When he struck Lawrence the latter had a right to defend himself, and the exercise of that right could afford defendant no excuse for killing him. So determined was he to take the life of Lawrence, that while his right hand in which he held a pistol was held by Litsch, so that he could not use it, with his left he fired the fatal shot over the shoulder of Litsch, who stood between him and Lawrence.

We have carefully examined the record to find evidence tending to mitigate the offense of which defendant was guilty, but have failed to discover a circumstance to indicate that it was other than a deliberate murder. That he intended to kill; that there was no excuse or justification for the killing; that the provocation was slight, and that the deceased explained and apologized for it, were clearly proved, and we should have to disregard all the authorities to hold that it was a proper case for an instruction in regard to murder of the second or manslaughter in any degree.

There was nothing in the alleged misconduct of the prosecuting attorney in interviewing the defendant's witness, or in the remark to the jury in his argument that the murder was admitted, to justify a reversal of the judgment. On these points the observations of the Court of Appeals, in its opinion, are apposite, and we adopt them as very clearly expressing our views. So of the exhibition to the jury of the bones of the vertebral column of the deceased. It served to show to the jury the attitudes and relative positions of the parties when the shot was fired. It was not an unnecessary parade of the bones of the dead man to excite prejudice against his slayer, but was legitimate and

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proper evidence, and a party cannot, upon the ground that it may harrow up feelings of indignation against him in the breasts of the jury, have competent evidence excluded from their consideration.

We are all agreed that the judgment should be, and it is, accordingly affirmed.

AFFIRMED.

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McGREW V. FOSTER, APPELLANT.

1. **Attachment:** MOTION TO SET ASIDE JUDGMENT AND QUASH EXECUTION. A motion to set aside a judgment and to quash the execution for irregularity in the judgment, must, in attachment cases, be filed within two years after the rendition of the judgment; or it will be unavailing.
2. **Bill of Exceptions:** RECORD. An entry of record is necessary to authenticate a bill of exceptions, and to show that it has been filed.

*Appeal from Adair Circuit Court.*—HON. JOHN W. HENRY, Judge.

*John D. Foster and Thos. C. Fletcher* for appellant.

*DeFrance and Halliburton* for respondent.

SHERWOOD, C. J.—This case was here before, (54 Mo. 258.) It came up then, because of the refusal of the court rendering judgment, to quash two executions, issued to different counties. That judgment was affirmed.

It has hitherto been the currently received opinion, that when affirmance occurs, that is an end of the case. The fact that defendant "kept his motion on the docket regularly," after the cause came up here, could by no means alter or diminish the results incident to such affirmance. This being the case, what is termed an "amended motion" to set aside the judgment, etc., cannot be considered, as more than three years had elapsed between the

rendition of the judgment and the filing of the amended motion.

But it seems to be thought that defendant is entitled to have that motion treated as a petition for review. Should we be disposed to regard it in this light, however, we are met by the fact that even the original motion was not filed within two years after rendition of the judgment complained of. And in attachment cases such petition must be filed within this period, or else the statutory method of redress will be denied. (1 Wag. Stat., p. 193, §§ 60 & 61.) The general statutory provisions relating to petitions of this sort, (2 Wag. Stat. 1054, §§ 13 & 15) have no application to suits instituted by attachment; so that, should we entirely disregard the effects and consequences of the judgment of affirmance, treat the original motion to set aside the judgment for irregularity, and to quash the execution for like cause, as an incipient petition for review, and the amended motion as a continuance thereof, still we are confronted by the bar the statute interposes; for the judgment was rendered in May, 1868, and the first motion not filed until March, 1871, or more than two years after judgment rendered.

But an obstacle equally insurmountable to a reversal herein is met in this, that there is no record entry, which authenticates the bill of exceptions and shows it to have been filed. *Fulkerson v. Houts*, 55 Mo. 301.

We, therefore, affirm the judgment. All concur, except HENRY, J., not sitting.

AFFIRMED.

GLASS V. WALKER, *Assignee of the State Insurance Company, Plaintiff in Error.*

**Policy of Insurance:** LIMITATION AS TO TIME OF BRINGING SUIT. The charter of an insurance company required all suits to be brought on policies issued by the company within twelve months from the date of loss. A policy issued to the plaintiff contained a stipulation that it was made and accepted subject to the charter, and also provided that no suit or action for the recovery of any claim by virtue of the policy should be sustained in any court, unless commenced within twelve months after the loss should occur, and should any suit or action be commenced after the expiration of twelve months, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim, any statute of limitation to contrary notwithstanding. Plaintiff brought suit on the policy more than twelve months after a loss had occurred; *Held*, that the above stipulation was operative and binding, and precluded the plaintiff from maintaining his suit.

*Error to Probate and Common Pleas Court of Newton County*  
HON. P. H. EDWARDS, Judge.

P. T. Simmons for plaintiff in error.

Suit was not commenced within twelve months next after the loss occurred, as required by the policy and the charter, Sess. acts. 1872, p. 238 § 13; Wag. Stat., Vol. 2 § 1, p. 1006; *Keim v. Home Mut. Fire and Marine Ins. Co.*, 42 Mo. 38; Angell on Fire and Life Ins., par. 14.

C. W. Thrasher, for defendant in error.

If the limitation of twelve months for bringing suit contained in the charter of the company, would, under any circumstances, have any effect, it was waived by the action of the company in the case, and the assured was remitted to his rights under the general law of limitation. Monk's Vansantvoord's Pl., (3rd ed.,) 677; *Nute v. Hamilton Ins. Co.*, 6 Gray 174, 179; *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 6 Gray 596; *Hall v. Peoples Mut. Fire Ins. Co.*, 6 Gray



185, 192. In this case the company made no determination regarding the loss.

NORTON, J.—This suit was instituted in the probate and common pleas court of Newton county, for the recovery of the value of a stock of drugs and medicines, which had been insured by the defendant, and which had been destroyed by fire. The petition is in the usual form, and alleges the total destruction by fire of the property insured, and asks judgment for \$1,500—the full amount insured by the policy.

The answer of defendant admits the contract of insurance; alleges misrepresentation in reference to the value of the goods in plaintiff's application for a policy; that plaintiff willfully procured the burning of the insured property; that the probate and common pleas court of Newton county had no jurisdiction of the cause; and that the suit, not having been brought within twelve months after the loss occurred, was not, under the contract of insurance, maintainable. The answer denies the total destruction of the property, and also denies that plaintiff performed the conditions contained in the policy of insurance. The replication of plaintiff puts in issue, the new matter set up in the answer. Upon a trial the plaintiff recovered judgment from which defendant, after his motions for new trial and arrest of judgment were overruled, has appealed to this court.

It was shown by the evidence that the defendant, on the 3rd day of July, 1872, issued its policy of insurance to plaintiff against loss by fire, to the amount of \$1,500 on a stock of drugs and medicines, in Granby City, Newton county, for the term of one year, for which plaintiff paid defendant a premium of \$37.50. Among other conditions, said policy contained the following: "In case of loss, the assured shall forthwith give notice to the secretary of the company, and within thirty days after such loss, deliver, at the office of the company in Hannibal, in person, by agent,

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mail or express, a particular account of said loss, signed and sworn to by him, naming each article, and the cash value thereof, &c.; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or clerk of a court of record, nearest to the place of the fire, stating that he has examined into the circumstances of the loss; knows the character of the assured, and believes that the assured has, without fraud, sustained a certain amount of loss. It further provides that the assured shall, if required, submit to an examination, under oath, by any officer of the company or any person appointed by it; and that no suit or action for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery, unless it shall be brought within twelve months next after the loss shall occur; and should any suit be commenced after the expiration of twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, any statute to the contrary notwithstanding." It is also stipulated that "this policy is made and accepted upon the above express conditions, and the charter and by-laws of this company, are to be resorted to and used to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for."

The evidence showed that nearly all the property insured was consumed by fire on the 14th day of November, 1872; that immediately after the loss the insured sent a dispatch to the secretary of defendant, which was received, and the next day after the loss informed the company by letter thereof; that soon thereafter, the defendant sent to Granby City, L. Coons, as an agent, to adjust the loss; that said agent made up the statements and papers to be signed by plaintiff, and examined the plaintiff, under oath, fully as to the facts and circumstances of the loss, reducing the same to writing, which was sworn to and subscribed by plaintiff; that Coons informed the insured that if anything more was required of him he would notify him



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thereof; that afterward, one Judson, the local agent of the company, gave plaintiff notice to furnish him copies of invoices which had been burned, which was done as far as was practicable; that the petition was filed on the 6th day of December, 1873, and summons issued thereon in February, 1874. The charter, as amended, and which was by the terms of the policy, a part of it, contained the following provision: "If the party sustaining loss or damage, is not satisfied with the determination of said company regarding the loss or damage, he may bring an action for the recovery of such loss or damage, in the Hannibal court of common pleas, to be holden in the county of Marion, and if, upon trial, a greater sum shall be recovered than the amount determined by the company, the party suffering shall have judgment, with 6 per cent. interest; provided that execution shall not issue on any judgment until after the expiration of three months from its rendition, and that suit must be brought within twelve months from the date of loss." Acts 1872, p. 238, § 13.

It is unnecessary to notice the objections urged to the action of the trial court in disregarding the demurrer and the motion of defendant to rule plaintiff to give security for costs, and proceeding to try the case without a disposition of either; nor is it necessary to notice the various objections to the insufficiency of the petition, or to the giving and refusing instructions, as we think the error committed by the court in refusing the following declaration of law, asked for by defendant, is conclusive of the case: "The court instructs the jury that unless they find from the evidence that this suit was commenced within twelve months next after the loss occurred, they will find the issue for defendant." The policy contained a provision "that this policy is made and accepted upon the above express conditions, (referring to the conditions contained in the policy) and the charter and by-laws of the company." One of the conditions in the policy was as follows: "It is also expressly covenanted that no suit or action against this com-

pany, for the recovery of any claim by virtue of this policy, shall be sustained in any court, unless such suit or action shall be commenced within twelve months next after the loss shall occur, and should any suit or action be commenced against this company, after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The charter of the company being referred to in the policy, as a part of it, became as much so as if it had been copied in full therein. The charter provides: "That suit shall be brought by assured within twelve months from the date of loss." The contract of insurance stands upon the footing of other contracts, and it being voluntarily entered into, either party may insert and insist upon conditions for the benefit of either, and when they are so inserted and agreed upon, it is the duty of courts to enforce them, when not against public policy, and when legal. We can perceive no reason why such conditions as the above may not be agreed upon between the assurer and assured, and when agreed upon, they are operative and binding on the parties. So far as adjudicated cases have come under our observation, such conditions have been upheld. In the case of *Amesbury v. Bowditch Mutual Fire Ins. Co.*, 6 Gray 596, it was held that a stipulation in a policy that any action for the loss claimed, must be brought within four months, at a proper court, in the county in which the office of the company is situated, is valid, so far as the limitation of the time is concerned, though void so far as it affects the jurisdiction of courts. So in the case of *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. C. C., 280, Justice Nelson, in speaking of such conditions, says: "That the clause contemplates a loss about which a controversy may arise between the insured and the company, and in respect to which the right to indemnity may be denied. The object was not to foreclose it and prevent a resort to a proper

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tribunal, but to compel a speedy resort and a termination of the controversy, while the facts were fresh in the recollection of the witnesses and parties, and the proofs were accessible. While it is not perceived to be at all injurious to the rights of the insured, it is manifestly beneficial to the company, who stand on the defensive and are obliged to wait the action of the adversary party."

So in the case of *Ketchum v. Protection Ins. Co.*, 1 Allen (N. B.) 136, 187, Justice Chipman observes: "There are many and good reasons, in cases of insurance against fire, why the assurers should introduce such a condition in their policies; they are always liable to fraud being practiced upon them, and it is very often extremely difficult to detect the fraud, or to get evidence to substantiate it in a court of justice, and the greater the lapse of time the greater the difficulty would be." "We, therefore, think it a wise and provident precaution to take—such as the assurers are legally justified in—to limit, in their policies, the times within which actions are to be brought, as a necessary protection to themselves against fraud; and, they have as much right to make such a stipulation, as the terms only on which they will take the risk, as they have to introduce any other condition, for the contract is voluntary, and they have a clear right to stipulate their own terms." In both of the above cases the following was the condition in the policy: "No suit or action of any kind against said company, for the recovery of any claim, upon, under or by virtue of this policy, shall be sustained in any court of law or chancery, unless said suit shall be commenced within the term of twelve months next after the cause of action shall accrue."

The same view was taken in the case of *Wilson v. Aetna Ins. Co.*, 27 Ver. 99. So also in the case of *Keim et al. v. Home Mutual Fire and Marine Ins. Co.*, of St. Louis, 42 Mo. 38, where the contract of insurance contained a condition that all claims under it should be forfeited, unless suit were brought to the next term of court, held sixty

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days or more after refusal of company to pay. Judge Wagner observed that the contract of insurance is voluntary, and the insurers have the same right to incorporate and impose this as any other condition, and if the assured objects to it, he is under no obligations to conclude the contract; but if he will voluntarily enter into it, he will be bound by it. The suit can only be brought on the contract, as contained in the policy, and one of the conditions of the policy, voluntarily agreed upon between the parties operates as a limitation, and precludes the plaintiffs from maintaining their action. In the case at bar, the loss occurred on the 14th of November, 1872, and the petition of plaintiff was filed on the 6th of December, 1873.

In the light of the adjudicated cases, as well as the reason of the case, the judgment of the court will be reversed, because of the error committed in refusing the instruction quoted herein; in which the other judges concur.

REVERSED.

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PEYRIE, *Appellant* v. SCHREIBER *et al.*

**United States Internal Revenue: SUCCESSION TAX: COLLECTOR'S NOTICE OF SALE.** When the owner of land, on account of which a United States succession tax has been assessed, resides in the same collection district with the land, but not upon it, a collector's notice of seizure and sale of the same to pay the tax, is not lawfully served upon him by leaving a copy at the domicile on the land.

*Appeal from Buchanan Circuit Court.*—HON. JOS. P. GRUBB,  
Judge.

W. H. Sherman for appellant.

Mossman and Loan for respondent.

HOUGH, J.—This was an action of ejectment for land in Buchanan county. The plaintiff claimed title under

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deed made to him by the deputy collector of internal revenue for the 6th collection district of Missouri, in pursuance of a sale made by said collector of the premises in controversy for a succession tax assessed against the same, under the revenue laws of the United States. At the trial, the collector's deed was offered in evidence, but was excluded by the court, and the plaintiff thereupon took a non-suit with leave to move to set the same aside, and has brought the case here by appeal.

The sale by the collector was made under the 9th section of the act of Congress of July 13th, 1866, in relation to internal revenue. That section provides, *inter alia*, "That in any case where goods, chattels, or effects sufficient to satisfy the taxes imposed by law upon any person liable to pay the same, shall not be found by the collector or deputy collector, whose duty it may be to collect the same, he is hereby authorized to collect the same by seizure and sale of real estate; and the officer making such seizure and sale, shall give notice to the person whose estate is proposed to be sold, by giving him in hand, or leaving at his last or usual place of abode, if he has any such within the collection district where said estate is situated, a notice, in writing, stating what particular estate is proposed to be sold, describing the same with reasonable certainty, and the time when and place where said officer proposes to sell the same." The deed offered in evidence, and rejected by the court, recited that notice was served upon the successors "by leaving a copy of the notice as provided by law, at the domicil on the estate seized as above described, and also with the administrator."

It is apparent from the foregoing recital, that the requirements of the statute in relation to notice were not complied with. It nowhere appears that "the domicil on the estate seized" was the last or usual place of abode of any of the successors. On the contrary, it inferentially appears from the face of the deed itself, that such "domicil" was not the last or usual place of abode of any of said



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successors, and that a portion of them, at least, resided in the same collection district in which the estate sold, was situated, as it is previously recited in the deed that they resided at St. Joseph, in said county of Buchanan, and in St. Louis, and the property sold is described as the south-east quarter of section six, township fifty-seven, range thirty-five, containing one hundred and thirty acres more or less, situated in Buchanan county.

The circuit court, therefore, committed no error in excluding the collector's deed, and its judgment will be affirmed. Judges SHERWOOD and NAPTON concur; Judges NORTON and HENRY, not sitting.

AFFIRMED.

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ADCOCK, *Appellant* v. LECOMPT.

**Elections:** NOTICE OF CONTEST WHEN INSUFFICIENT. The statute (Wag. Stat., p. 573, § 57) requires contested elections to be determined at the first term of the county court, which shall be held fifteen days after the official count, but does not specify whether the term shall be a regular, or a special, or an adjourned term, although provision is made by law for all such terms. Notice was given by the contestant that he would contest the election of the contestee to the office of collector, at the next term of the county court, to be begun and holden on the first Monday in January, 1877, but it appeared that the next term after this notice was given was on the first Monday in February, 1877, and that no court was held in January; *Held*, that the day specified in the notice was material, and that the notice given was insufficient to sustain proceedings begun on the first Monday in February.

*Appeal from Barry Circuit Court.*—HON. W. F. GEIGER,  
Judge.

*Lay & Belch with John W. Wellshear* for appellant.

The notice was not void, because it notified the respondent that the contest would be heard at a court to be holden at a time when no court was or could be held.

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The respondent was in nowise misled by the notice. He was present on the first Monday in February, and his motion to dismiss was also in the nature of a demurrer, and, in ordinary suits, would bind him as an appearance. Respondent was notified that the contest would be had at the next term of the county court; and this was by law required to be holden on the first Monday in February, 1877; and of this requirement respondent is presumed to have had knowledge. Wag. Stat., p. 573, § 57; p. 442, § 17; *Lore v. McRae*, 12 Ala. 444; *Phillips v. Lemoyne*, 4 Ark. 144; *Rogers v. Miller*, 5 Ill. 333; *Hare v. Niblo*, 4 Leigh (Va.) 359; *Merrill v. Barnard*, Phillips L. Rep. (N. C.) 569. Such a defect would be cured by judgment. Wag. Stat., Vol. 2, p. 1036, Sec. 19; *Doan v. Boley*, 38 Mo. 449; *Decatur County v. Clements*, 18 Iowa 536

*E. L. Edwards & Son with George Hubbert* for respondent.

This proceeding is a mere contest between private persons. *State ex rel. Hequembourg v. Lawrence*, 38 Mo. 535; *State ex rel. Young v. Buskirk*, 43 Mo. 111; *Vail v. Dinning*, 44 Mo. 210. Jurisdiction over respondent was not acquired by service of the process essential thereto. *Ray County v. Barr*, 57 Mo. 290; *City of Boonville v. Omrod*, 26 Mo. 193; *Dickey v. Tennison*, 27 Mo. 373. The "legal notice" required by section 52 of the statutes is designed to perform the office of a writ of summons, and section 54 requires it to set out facts as in a petition. Wag. Stat., (Ed. of 1872,) p. 573. Castello's case, (see Lackland's return, which is accepted as correctly construing the statute, page 265) 28 Mo. 259.

If contestee be not brought into court, or good grounds for contest specified, the proceeding will be dismissed, and objections in both particulars may be combined in the same motion without prejudice. *Wilson v. Lucas*, 43 Mo. 290. A summons returnable to a day preceding the



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beginning of the court, or a notice of judicial proceeding not specifying time and place, or specifying a false time or place, is void. *Estee's Pl.*, Vol. 3, p. 275; *Dickey v. Tension*, 27 Mo. 373; *Holliday v. Cooper*, 3 Mo. 286. 1st Tidd's Pr., (4 Am. Ed. from 9th London) top p. 163, § 164-7. In the case at bar, the county court was held, in fact, and under the law, beginning on the first Monday in February. Of this there can be no question now, although respondent was not bound to know but the time for its holding had been changed.

NAPTON, J.—The only question in this case is as to the sufficiency of a notice in a contested election for the office of collector. The notice was as follows: "You will take notice that at the next term of the county court, within and for the county of Barry, and State of Missouri, to be begun and holden in the town of Cassville, in said county, on the first Monday in January, 1877, I will contest your election to the office of collector of the revenue, etc." The notice proceeded to enumerate nineteen specific reasons in support of the allegation that the party notified was not elected. The next term of the county court, held after this notice, was on the first Monday in February—and no court was held in January. At the session of the court in February, the contestee filed a motion to quash the notice, which was overruled. On appeal to the circuit court this motion was sustained, and the contestant appealed to this court.

The statute concerning contested elections, (1 Wag. Stat., p. 573, Sec. 57,) requires them to be determined at the first term of the county court, which shall be held fifteen days after the official count. The statute does not say that this term shall be the regular term, or special term or adjourned term—but the first term or session of the court, whether regular, adjourned or special. The statute did not necessarily require the notice in this case to specify the first Monday in February, for there might have been

a change in the regular term, or there might have been an adjourned term or a special term on the day specified in the notice. The 17th section of the act, concerning county courts, provides for four terms of the court, on the first Mondays in February, May, August and November, but provides further, that, "The county courts may alter the times for holding these stated terms, giving notice thereof in such manner as to them shall seem expedient." And section 18, (p. 442, Vol. 1,) says that "each county court may hold adjourned terms at any time;" and section 19 says, "The president, or any two justices of the county court, may order a special term, whenever the business and interests of the county require it." So that it is not clear that a notice in this case simply to appear at the next term of the county court, without stating the time when such court would be held, would be sufficient, upon the ground that the contestee was bound to know the law. But in this case the notice specifies the day when the next term will be held, and although the day named was not the day fixed in the statute for the regular term, yet, as the law allowed the court to change the time of its regular sessions, and it was not necessarily known to the contestee, but that such change had been made, the day specified in the notice was material.

The case of *Love v. McCrew*, (12 Ala. R. 444) and other similar decisions in regard to mistakes in writs, which by law are returnable to fixed terms of a court, are not applicable to this case. The judgment of the circuit court is affirmed. The other judges concur.

AFFIRMED.

## ANDERSON V. GRIFFITH, PLAINTIFF IN ERROR.

**Waiver of Vendor's Lien.** Defendant having sold a tract of land to one P., on the same day bought another tract of plaintiff. For the purchase money of the latter tract plaintiff received defendant's two notes, together with the proceeds of defendant's sale to P., which consisted in part of cash and in part of notes executed by P. Defendant conveyed his land to P., and received from plaintiff a title bond for the land bought of him. A year afterward defendant, at the instance and by the advice of plaintiff, by the payment of \$100 obtained from P., a mortgage on the land he had sold P. securing the payment of P.'s notes. Defendant's notes were paid, P. failed to pay his, and plaintiff foreclosed the mortgage, realizing a part of the debt only. In a suit to subject the land sold by plaintiff to defendant to the payment of the unpaid balance; *Held* that by advising and accepting the mortgage from P. plaintiff had waived any vendor's lien he might have had upon this land.

*Error to Knox Circuit Court*—HON. E. V. WILSON, Judge.

*E. G. Pratt* for plaintiff in error.

*J. G. Blair* for defendant in error.

NORTON, J.—The plaintiff, F. B. Anderson, on the 26th of May, 1871, filed his petition in the circuit court of Shelby county, and before answer was filed the venue of the cause was changed to Knox county circuit court, in which plaintiff, on the 18th of March, 1873, filed an amended petition making one Randolph a co-plaintiff. The petition alleges that plaintiffs were lately partners in trade, as merchants; that on the 20th of March, 1866, plaintiff Anderson sold to defendant certain lands in Shelby county for the consideration of \$2200; that \$800 was paid at the time and defendant executed his two notes to Anderson for \$200 each, payable in one and two years, with ten per cent. interest from date, and that defendant procured one Pasley to execute to Anderson, for the remaining \$1000, his two notes for five hundred dollars each, payable respectively on the 1st day of January, 1867, and 1st day of January, 1868, with ten per cent. interest from the 20th day of

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March, 1866; that it was agreed at the time between Anderson and defendant, that said notes should not be considered as payment of the said remainder of one thousand dollars, but that defendant was to be considered bound for the payment of the same, and that a lien should remain on said lands therefor; that on the day of sale said plaintiff, Anderson, executed and delivered to defendant his title bond, binding himself to convey the lands sold to defendant, upon the payment of all said notes, including the Pasley notes; that afterward said Anderson assigned all said notes to plaintiffs Randolph & Anderson; that on the 18th of March, 1868, plaintiffs assigned the said Pasley notes to one Eli Funkhouser; that said Pasley, at the request of defendant, executed a mortgage upon certain land in Marion county to plaintiffs to secure them in the payment of his two notes, and having made default, said Funkhouser instituted suit in the circuit court of Marion county to foreclose said mortgage, and in August, 1868, recovered judgment; that the land was sold under said judgment and was purchased by plaintiff Randolph; that, after applying the proceeds of the sale on said judgment, there was a balance left unpaid of \$597.45; that said judgment was assigned by said Funkhouser to plaintiffs; that said Pasley has no property out of which the remainder of said judgment can be made, and that defendant owes plaintiff the uncollected balance of \$597.45 on said purchase, with ten per cent. interest from 20th of March, 1866, which they ask to be made a lien on the land sold defendant.

The answer of defendant denies the allegations of the petition, and alleges in substance that defendant, in February, 1866, had contracted to sell certain lands in Marion county to one Pasley for the consideration of \$1800, eight hundred dollars of which was to be paid down, and the remaining one thousand to be paid in one and two years, for which said Pasley was to execute his two notes for \$500 each, to be secured by mortgage on the land; that on the 20th of March, 1866, plaintiff, Anderson, agreed with de-

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defendant to take the proceeds of the sale to Pasley and defendant's two notes, each for \$200, payable in one and two years, in payment for certain lands of said Anderson, in Shelby county; that on said day he executed a deed to said Pasley for the Marion county land, and Pasley paid to said Anderson \$800 cash, and executed his two notes to Anderson as agreed upon for the remaining \$1000; that said Anderson executed his title bond to defendant, and took the two notes of defendant for \$200 each; that subsequent thereto he paid off his two notes, and plaintiff executed his deeds to defendant for the land sold, and received from defendant his title bond. The answer also sets up the statute of limitations as a bar to plaintiff's action, and also alleges that there was no note or memorandum in writing of any agreement on the part of defendant to pay the Pasley notes, but that said notes were taken as absolute payment for \$1000 of the purchase money of said land. The answer further alleges that the land of Pasley, upon which a mortgage was given, was bought by plaintiff Randolph at a sale made under a decree foreclosing the same, and that Randolph realized therefrom, the sum of \$1800, the Pasley debt only amounting to about \$1300. The replication of plaintiff puts in issue the new matter set up in the answer, admits the execution of the deed to defendant, but denies that it was delivered to him, and charges that its possession was procured by fraud. The cause was tried by the court, and judgment was rendered for plaintiff for the sum of \$975.89, which was declared to be a vendor's lien on the land. From this judgment defendant, after making an unsuccessful motion for a new trial, has appealed.

It appears from the evidence that Anderson, one of plaintiffs sold to defendant certain lands in Shelby county, and, on the 20th of March, 1866, executed and delivered to defendant, his title bond as follows: "Whereas James Griffith has bought of me the se  $\frac{1}{4}$  of se  $\frac{1}{4}$  Sec. 1, except 20 acres out of the northwest corner; also the ne  $\frac{1}{4}$  of se  $\frac{1}{4}$



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Sec. 1, and e  $\frac{1}{2}$  of ne  $\frac{1}{4}$  Sec. 2, T. 59, R. 9, situated in Shelby county, for and in consideration of the sum of \$800, to me in hand paid, the receipt of which is acknowledged, and two promissory notes signed by said James Griffith, bearing date March 20th, 1866, one for two hundred dollars due on the first day of January, 1867, the other for \$200 due on the first day of January, 1868, both with interest from date at ten per cent. per annum; also for two notes signed by James M. Pasley, one for five hundred dollars due January 1st, 1867, the other for five hundred dollars due January 1st, 1868, with interest at the rate of ten per cent. per annum; now when the said notes shall be paid according to the tenor thereof, and all interest that may be due thereon, then I bind myself in the sum of twenty-two hundred dollars to make, or cause to be made, a good and sufficient deed to James Griffith to the above described tract of land." On the same day that this bond was executed, and prior to its execution, Griffith, the defendant, agreed to sell his land in Marion county to the said J. M. Pasley, for the sum of \$800 cash to be paid down, and said Pasley's two notes for \$500 each. Griffith testifies that afterward, and on the same day, he proposed to buy of Anderson the land described in the title bond, and offered to give him \$2200 for the same, if he would take Pasley for the \$1800 which Pasley had agreed to pay defendant for his farm; that Anderson agreed to take Pasley by his paying \$800 down, and his note for \$1000; that he gave to Pasley a general warranty deed for the land in Marion, and that Pasley, as agreed, paid \$800 to Anderson, and also gave his two notes to Anderson for \$500 each; that his deed to Pasley, Pasley's two notes to Anderson, defendant's two notes to Anderson, and the title bond of Anderson to defendant, were all made at the same time. He further testifies that Pasley was to give a mortgage on the land to secure the two five hundred dollar notes. He further testifies that about one year after the title bond was given the plaintiffs sent him word that he must have Pasley execute

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a mortgage, or that they would hold him liable for the Pasley notes, that thereupon he paid Pasley the sum of one hundred dollars and procured him thereby to execute a mortgage on the Marion county land, to the plaintiffs, to secure them in the payment of the Pasley notes, which mortgage was accepted by them. Griffith also testifies that he subsequently paid off the two notes of his own for \$200 each, received from Anderson a deed to the land mentioned in the title bond, and surrendered the title bond to Anderson.

Anderson, one of the plaintiffs, testifies that he sold the land to defendant for \$2200; that \$800 was paid in cash; that Griffith, the defendant, executed his two notes for \$200 each, and he received two notes of Pasley for \$500 each, that the Pasley notes were not received as payment, but to accommodate Griffith and for collection, and that when collected they were to be credited to defendant. He swears that he turned the Pasley notes over to Randolph & Anderson, plaintiffs herein, also that he knew nothing about the mortgage, that defendant came to him and wanted to be released, and he advised him to take a mortgage from Pasley to secure the two five hundred dollar notes. Randolph, the other plaintiff, testifies that about one year after the date of the title bond, defendant paid Pasley \$100 to execute a mortgage; that he had a talk with defendant, and told him to see Pasley and get a mortgage, and defendant did so. He also testifies that the Pasley notes were not taken as payment, but only for collection. Randolph swears that the deed from Anderson to Griffith was delivered without authority. Anderson, who executed the deed, swears that he gave it to one R. E. Anderson, with instructions not to deliver it till the suit was settled. He does not deny, or is silent, as to the delivery to him by defendant of the title bond.

Under the state of facts shown by the evidence, we do not see how the judgment can stand. The evidence is conflicting as to the understanding of the parties in regard to

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the two five hundred dollar notes of Pasley. The plaintiffs testify that they were received by them, not in payment of any part of the contract price for the land sold to defendant, but only to be collected, and the amount collected to be credited to defendant. The defendant on the contrary claims that the agreement was that said notes were to be taken in absolute payment for \$1000, and that in fact they were so taken by Anderson, and were made payable to him. The title bond does not disclose the contract price in terms, but states that plaintiff Anderson had sold the land to defendant in consideration of \$800 cash paid, two notes of defendant for \$200 each, and two notes of Pasley for \$500 each. These statements in the title bond would seem to sustain defendant's theory that the notes were received in absolute payment for \$1000, and negative the idea that they were simply taken for the purpose of collection. It is clear from the evidence that the two notes in question being made payable to Anderson became absolutely his, and gave him the right to dispose of them as his, which right he exercised, for he swears he turned them over to the firm of Randolph & Anderson as so much capital stock in their business. It is, however, said that this view is overthrown by the subsequent stipulation in the bond that "when said notes shall be paid according to the tenor thereof, &c., I bind myself in the sum of \$2200 to make, or cause to be made to the said Griffith, a good and sufficient deed." Giving to this language its broadest signification, and construing it so as to include the Pasley notes as well as the Griffith notes, its only effect was to create, by the terms of the bond, a lien for the payment of the Pasley notes on the land to be conveyed. If such was its effect, the question arises, was this lien subsequently waived by Anderson in making the deed to defendant Griffith upon the payment of his two notes, or by the act of Anderson & Randolph in accepting and advising, a year after the transaction, a mortgage from Pasley and wife, to secure the Pasley notes, on the land which defendant had

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conveyed to him. Inasmuch as there is a conflict of evidence touching the delivery of the deed to defendant by Anderson, and the surrender by defendant of the title bond to Anderson, we will pass in our consideration that question and consider the legal effect of the mortgage made by Pasley.

There is no dispute in regard to the Pasley notes being made payable to Anderson, nor that he turned the notes over to the firm of Randolph & Anderson, of which the vendor Anderson was a partner. There is no question that long after the execution of the Pasley notes both the plaintiffs advised Griffith, the defendant, who was seventy-five years old when this suit was tried in the court below, to procure a mortgage from Pasley. Both of the plaintiffs swear that they so advised him, and defendant swears that they told him they would hold him liable unless it was done, which was equivalent to saying they would not hold him liable if it were done. The evidence both of plaintiffs and defendant shows that defendant, in pursuance of this advice, paid Pasley \$100 to execute the mortgage to plaintiffs to secure the payment of his two notes, to them. Defendant was thus deprived of any lien which he might have had against Pasley for the purchase money of the land he had sold him, and also of the \$100 he paid for its execution under the advice of plaintiffs. While defendants thus lost the plaintiffs acquired an independent lien on the land which defendant had sold to Pasley and a new security for the payment of the Pasley notes. This they utilized by foreclosing, selling and buying the land thus mortgaged. Having thus obtained the land itself sold by Griffith to Pasley, and \$800 besides, they, in this suit, seek to subject to a vendor's lien the land sold by them to Griffith, the defendant, for the unpaid balance of the Pasley notes. We think this cannot be done; for when they accepted the said deed of mortgage to secure the Pasley notes they thereby waived any vendor's lien on the land

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sold by Anderson to Griffith. *Emison v. Whittelsey et al.*, 55 Mo. 254.

Judgment reversed and cause remanded, in which the other judges concur

REVERSED.

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DUKE *et al.* v. HARPER *et al.*, Appellants.

**Champerty.** In this State, champertous contracts are void; but, a contract between attorney and client is not champertous, because the attorney agrees to receive, as a compensation for his services, a portion of the property in controversy; it is an essential element in a champertous contract, that he also agree to pay some portion of the costs or expenses of the litigation.

*Appeal from St. Louis Court of Appeals.*

Respondents sued for damages sustained by them, by reason of the breach of a contract for the conveyance by appellants of one-fourth interest in certain property, which was to be recovered in proceedings to be instituted for appellants, and in their name by respondents as attorneys at law, in proper courts. The conveyance was to be made in consideration of the professional services to be rendered by respondents in conducting the legal proceedings necessary for its recovery. Appellants demurred on the ground that the contract, on which the suit was founded, was champertous. The trial court sustained the demurrer, and judgment was rendered for appellants. This judgment was affirmed by the court at general term. By the St. Louis Court of Appeals the judgment of the circuit court was reversed and remanded; and the case is here by appeal from that judgment.

*Martin & Lackland* for appellants.



The first point we make is, that the statute law of Missouri, declares a contract of the kind referred to null and void, and is found in 2d Wag. Stat., p. 866, Sec. 1, as follows: "The common law of England and all statutes and acts of parliament made prior to the fourth year of James I, and which are of a general nature not local to that kingdom, which common law and statutes are not repugnant to, or inconsistent with the constitution of the United States, the constitution of this State, or the statute law in force for the time being, shall be the rule of action and decision in this State, any law or custom to the contrary notwithstanding." This has been the law on our statute books ever since the year 1816, when the Spanish law was abolished, and is now the law of this State. It is admitted in the opinion of the court below, that champerty was illegal prior to and in the fourth year of James I. in England.

Then, if it was illegal in the fourth year of James I., there are three questions to settle, in order that we may determine if the section referred to covers the case at bar:

1. Are the English statutes and common law on the subject of champerty of a "general nature, not local to that kingdom?"
2. Are they "repugnant to the constitution of the United States?" and,
3. Are they in conflict with any "statute law in force at the time being or the constitution of this State?"

In order to determine these questions, we will call the attention of the court to the substance of these various enactments. The first we find is the statute of Westminster 1, (3d Edw. 1.) Ch. 2, which says: "That no officers of the king, by themselves, nor by others, shall maintain pleas, suits, or matters hanging in the king's court, for lands, tenements, or other things, for to have a part or profit thereof."

The statute of West. 2, (14 Edw. 1.) Ch. 49, enacts,

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"That the chancellor, treasurer, justice, nor any of the king's counsel, nor clerk of the chancery, nor of any justice or other officer, nor of any of the king's house, clerk nor laymen, shall not receive any church nor advowson of a church, land or tenement in fee, by gift, nor by purchase, nor to farm nor by champerty, nor otherwise so long as the thing is pending before any of our officers; nor shall he take, nor receive a portion thereof." Then follows the penalty.

The statute of 28 Edw. 1, Ch. II, referring to the foregoing acts, says: "That the king wills that no officer, nor any other (for to have part of the thing in plea,) shall take upon him the business that is in suit, nor none upon any such covenant shall give up his right to another. \* \*

\* \* But it may not be understood hereby that any person shall be prohibited to have counsel of pleaders or of learned men in the law for his fee, etc."

1st Rich. 2d, Ch. 9, makes any gift or feoffment of land or goods in dispute or under legal proceedings, void. And by 13 Edw. 1, Ch. 49, "No person of the king's house shall buy any title where the thing is in dispute." In 32 Hen. 8, Ch. 9, it is enacted, "That no one should buy or sell or obtain any pretended title to land unless the seller, his ancestors, or they by whom he claims have been in the possession of the same."

Now, are the foregoing enactments of a "general nature," "and not local to that kingdom," in the language of our statute? We most unhesitatingly assert that they are general, and not local. That at the time of their enactment in 1816, by the Legislature of this State, they were the law of the realm, and were in force over every inch of British territory, and were not in the slightest sense of the word local in nature. They were as general in their nature in England, as any act of Congress on the question of finance, revenue or customs, is general in the United States. Dwarries on Statutes, p. 384; Cooley's Black., Vol. 1, p. 86; Law & Eq. Rep., 1 Chan. Div. 573, in re Attor-

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ney's and Solicitor's Act, Oct., 1873; *Scobey v. Ross*, 13 Ind. 117; *Sedgwick v. Stanton*, 4 Kernan 289; *Sweet v. Poor*, 11 Mass. 549; *Brinley v. Whiting*, 5 Pick. 348; *Arden v. Patterson*, 5 John. Ch. 44; *Byrd v. Odem*, 9 Ala. 755; *Sessions v. Reynolds*, 7 Miss. 130; *Wilson v. Nance*, 11 Hum. (Tenn.) 189; *McGoon v. Ankeny*, 11 Ill. 558; *Deshler v. Dodge*, 16 How. 622.

2. The mere fact that there is no stipulation in the contract, that the attorneys are to pay costs, does not take away the taint of champerty. This contract, it is true, is silent on that point, but it is evident that the suit has to be prosecuted at the cost of either the parties themselves or the attorneys. Now, there is no stipulation that the parties are to pay costs, and as to who are the responsible parties, is a matter of implication. We contend that the implication that this duty falls on the lawyer, is stronger than that it is the duty of the party to the suit, and we submit that so meager a defense should not be permitted to override the statute of our State and the high authority cited herein by appellants. *Scobey v. Ross*, 13 Ind. 117; *Holloway v. Lowe*, 9 Por. (Ala.) 488; *Evans v. Bell*, 6 Dana 479; *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489; *Merritt v. Lambert*, 10 Paige 352; *Wallis v. Loubat*, 2 Denio. 607; *Satterlee v. Frazer*, 2 Sandf. S. C. 141; *Sedgwick v. Stanton*, 14 N. Y. 289; *Ray v. Vattier*, 1 Ham. 132; *Weakly v. Hall*, 13 Ohio 167.

*Davis, Thoroughman & Warren* for respondents.

1. The overwhelming weight of authority is, that an essential element, if not the gist of the common law offense of champerty, is the agreement on the part of the champertor, "to carry on the party's suit at his own expense." Without this ingredient, we submit that no agreement of an attorney for the prosecution of a suit upon a contingent fee payable out of, or in proportion to the amount recovered, has been held in any well considered case in this country to be champertous. Blackstone's Comm. Vol. 4,

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p. 135; Kent's Comm. Vol. 4, p. 447; Chitty on Contracts (5th Am. Ed.) p. 675; 2 Chitty Crim. Law, p. 234; 2 Story's Eq. Jur., Sec. 1048 and notes, Secs. 1050, 1053; Bouvier's Law Dict. 218; *Boardman v. Thompson*, 25 Iowa 487; *McDonald v. R. R. Co.*, 29 Iowa 170; *Benedict v. Stuart*, 23 Barb. 421; *Ogden v. Des Arts*, 4 Duer 283; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Hoyt v. Thompson*, 1 Selden 347; *Stearns v. Felker*, 28 Wis. 594; *Allard v. Lamerande*, 29 Wis. 502; *Ex parte Peit*, 2 Wall., Jr. 563; *Bayard v. McLane*, 3 Harr. 139, (Del.); *Major v. Gibson*, 1 Patt. & H. 48, (Va.); *Tapley v. Coffin*, 12 Gray 420, (Mass.); *Hoffman v. Vallejo*, 45 Cal. 564; *Martin v. Clarke*, 8 R. I. 389.

2. While we insist that the contract in question was not champertous, even at common law, we submit further that the entire doctrine is at variance with our State legislation and institutions. The form of government, state of society and organization of courts existing in England, and which gave rise to the acts of Parliament on this subject, were so materially different from those existing in this State, that those laws must be regarded as local, and not consistent with our institution. There, the fees of attorneys were fixed by law and taxed as costs, while here their compensation is left to the agreement of the parties, and in the absence of fraud or improper conduct, should be enforced like any other contract between man and man. *Bentnick v. Franklin*, 38 Tex. 458; *Richardson v. Rowland*, 40 Conn. 565; *Matthewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Cal. 564; *Ogden v. Des Arts*, 4 Duer 283; *Mahoney v. Bergin*, 41 Cal. 423; 1 Selden, 347.

HENRY, J.—“Champerty,” says Hawkins, “is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it.” Sir Edward Cokes’ definition is similar, and he says it was an offense at common law before any statutes were passed on the subject, and cites Bracton and Fleta to

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support his position. Blackstone defines champerty to be "a bargain with the plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense." Bouvier's definition of the offense is the same as Blackstone's. Cooley's Blackstone, fourth book, 435; Bouvier's Dictionary, volume 1, 219. In a note to Cooley's Blackstone, Judge Cooley observes that "the tendency of late has been to confine these offenses (maintenance and champerty) within bounds somewhat narrower than those indicated by the older authorities," page 135. In *Lathrop v. Amherst Bank*, 9 Met. 490, the court said: "No doubt is entertained that the earlier doctrine as to maintenance has been very essentially modified." At the date of the American revolution the English common law was in this country learned from Blackstone. He was the standard authority, and in his commentaries, more than in the works of any other English author, did the lawyers of that generation study the English common law, and even now in the United States it is a text book in all the law schools, and no effort to supplant it has ever been successful. Kent's commentaries, notwithstanding the high estimate placed upon the work by the profession, is not regarded as a substitute for Blackstone, and an American lawyer who has not studied Blackstone's commentaries would be an exception among the thousands which the profession numbers.

The common law doctrine of champerty, as explained by Blackstone, became the law of the States of this Union which adopted the common law, except in a few of the States whose courts have held that the common law of champerty was not applicable to their circumstances. In *Richardson v. Rowland*, 40 Conn. 555, the learned judge who delivered the opinion of the court observes that, "among the States which discard the rule are Vermont, Delaware, Tennessee and Iowa." We may add to this list California and Texas. But even in Vermont, in *Danforth v. Streeter*,



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28 Vt, 490; Redfield, J., delivering the opinion of the court, said: "There are probably other things coming more nearly to the idea of the common law definition of maintenance or champerty, such as carrying on suits for a share of the avails and thereby increasing litigation, and some others perhaps which the law will still regard as champertous and not countenance. But the present case does not seem to us of that character." Again he said: "The offense certainly does not exist in form in this State unless the common law offense has been adopted as part of the law of this State, which I am reluctant to believe was the purpose of the Legislature unless with some qualifications." Unless the meaning of this language of the court be that the common law offense of champerty has not been adopted as a part of the criminal code of Vermont and is not punishable as a crime there, but that a contract is nevertheless void, which, by the common law is champertous, the above extracts are irreconcilable. We hold, however, that case to be an authority in support of the views we entertain of the case we are considering.

In the States of Kentucky, Alabama, Illinois, Indiana, Wisconsin, Ohio, Michigan, Massachusetts and Rhode Island, the common law offense of champerty is recognized whether to the extent of being punishable as a crime or only as invalidating contracts, which at common law were champertous, it is unnecessary in this case to inquire. Judge Story, in his commentaries, says: "It is deemed an offense against public justice and punishable accordingly both at the common law and by statute, as tending to keep alive strife and contention and to pervert the remedial process of the law into an engine of oppression." Story's Equity, § 1,048. In *Martin v. Clarke et al.*, 8 R. I. 402, the court said: "Whether we look therefore at the ancient common law, to the English statutes upon the subject, or to our own legislation, the conclusion must be the same, that champerty is an offense against the law. Being such it must avoid every contract." In New York they have

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champerty statutes which the courts of that State have evidently construed as covering the whole ground and repealing the common law. In *Thompson v. Reynolds*, recently decided by the Supreme Court of Illinois, but not yet reported, the following language was held by the court, Walker, C. J., delivering the opinion, a manuscript copy of which is before me: "It thus appears that champerty was an offense at the common law, and our General Assembly having adopted the common law of England as the rule of decision, so far as applicable to our condition, until modified or repealed, this must be regarded in this State as affecting all such contracts, and as being opposed to sound public policy." The agreement sought to be enforced there, was one by which it was stipulated that plaintiff should receive for his services a portion of what should be received in the suit, and bear the expense of its prosecution. It was held void, as a champertous contract.

We will not undertake to cite all the cases, but the weight of authority sustains the position that an act of the Legislature of a State, adopting the common law, with only the usual qualifications contained in such act, adopts the common law in regard to champerty. And generally the courts which have so determined have also declared that the law of champerty, as explained by Blackstone, and not as defined by Coke and the older authorities, is that which obtains. Blackstone, fourth book, 135; *Lathrop v. Amherst Bank*, 9 Met. 490; *Allard v. Lamerande*, 29 Wis. 502; *Martin v. Clarke et al.*, 8 R. I. 397; *Bayard v. McLane*, 3 Harrington 212; *Benedict v. Stuart*, 23 Barb. 421; *Ogden v. Des Arts*, 4 Duer 283. In *Bayard v. McLane*, *supra*, the court said, "this important ingredient of paying or contributing to the expenses of the suit, seems ever since to have been regarded as essential to constitute the offense of champerty, being introduced into all the elementary works of authority as a part of the definition." Counsel for appellants misconceive the case of *Allard v. Lamerande*, 29 Wis. 502. It was an action by plaintiff to recover from defen-

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dant a tract of land. Plaintiff had judgment and defendant appealed. He claimed "that a champertous agreement between plaintiff and plaintiff's attorney relating to the compensation of the latter was proved on the trial, and that the court erred in denying the motion of the defendant to dismiss the action because of such agreement." The court held that the law against champerty obtained in that State. Lyon, J., said: "In all the agreements which have been held by this court to be champertous, there were express covenants or stipulations that the champerters should pay the expenses of the litigation." Again: "Upon the whole we see no good reason founded on principles, either of justice, public policy, or professional propriety, for holding that the agreement between the plaintiff and his attorney is champertous, although upon the authorities it would be otherwise had the attorney agreed to pay the expense of the litigation.")

In the case of *Crow v. Harmon*, 25 Mo. 471, the following was the agreement sued on: "I promise to pay G. W. Crow one hundred dollars if the M. T. Lewis county-road is not opened and kept open along the creek where it is now located, or if said Crow should make null the present proceedings of the court and commissioners, as already had and done by them. I also agree that if said road is opened and kept open that said Crow shall have all the damages that may ever be assessed me for the same." Messrs. Foster, Vories and Loan, for defendant, contended that the agreement was champertous and void. Messrs. Hall and Gardenhire insisted that it was not champertous because there was no stipulation that Crow was to "supply money to carry on any suit on condition of sharing in any land or other property gained by it." The lawyers on both sides were of high standing at the bar, and seem to have assumed that the common law of champerty was the law in this State. Scott, J., delivered the opinion of the court and observed: "As to the objection that the contract was champertous, it may be answered that there is nothing on

the face of it showing that it is obnoxious to such an imputation, nor was there any evidence in support of it." This was all that was said in the opinion on that subject. We think the clear inference from the language of the court is that it regarded the common law of champerty as in force in this State. That case is also an authority for the position that to render a contract champertous, the party stipulating for a portion of what may be recovered as a compensation for his services must likewise agree to bear all or a portion of the expense of the litigation. The contract was clearly champertous according to the older English authors, for it was stipulated that, if the road was established, Crow was to have all the damages that might be assessed to Harmon on account of the condemnation of his land for that purpose. This is the only case we have been able to find in the Missouri Reports, and we are satisfied that it is the only one that has ever been before this court, until now, involving this question.

Section 1, page 886, 2d volume Wagner's Statutes, is as follows: "The common law of England and all statutes and acts of Parliament made prior to the fourth year of the reign of James I., and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the constitution of the United States, the constitution of this State, or the statute laws in force for the time being, shall be the rule of action and decision in this State, any law, custom or usage to the contrary notwithstanding." Although we adopted the common law without the qualification that it be applicable to our condition, the courts would be at liberty to declare that any portion of the common law inapplicable to our condition and circumstances, does not obtain here. But there is nothing in the law of champerty as expounded by Blackstone and Bouvier, and the American courts in the adjudicated cases which we have cited, that is not applicable to our condition. The race of intermeddlers and busy-bodies is not extinct. It was never confined

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to Great Britain, and the little band of refugees who landed from the Mayflower on the coast of New England were not entirely free from the vice of intermeddling in the concerns of other people. It is as prevalent a vice in the United States as it ever was in England, and we do not see but that a law restraining intermeddlers from stirring up strife and litigation betwixt their neighbors is wholesome and necessary, even in Missouri. A man having a doubtful claim to property in the possession of another, who would hesitate to incur the expense of testing its validity, will readily agree that one who will bear the burden of the contest, and take part of the recovery for his pay, may institute the suit in his name. Such contracts are champertous and should be so held on principle everywhere.

The contract under consideration, however, is not champertous, because while the attorneys agreed to receive as a compensation for their services, as such, a portion of the property in controversy, they did not bind themselves to pay any portion of the expenses of the litigation.

We do not agree with the court of appeals that "the whole doctrine of champerty and maintenance is a relic of a state of things long since passed away," and we affirm its judgment, not because champertous contracts are not void in this State, but because the contract in question is not champertous. All concur.

AFFIRMED.

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THE STATE V. PRESTON G. SMITH, *Appellant*.

**Larceny:** REMOVAL OF STOLEN PROPERTY INTO ANOTHER COUNTY.

Each asportation of stolen property from one county into another, is a fresh theft. An indictment for stealing a mare in Greene county, therefore, is supported by evidence that she was stolen by defendant in Laclede county, and subsequently carried by him into Greene.



*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

*J. L. Smith*, Attorney-General, for the State.

SHERWOOD, C. J.—Defendant was indicted for stealing a mare in Greene county. Indictment sufficient and trial regular in all its incidents. Result, conviction; and sentence, six years. All of the instructions on both sides were given. The first instruction for the State is based on and but an embodiment of section 25, 1 Wag. Stat. 456, the section under which the indictment was drawn.

The second instruction for the State presents the usual formula respecting recent possession of stolen property, and the conclusiveness of such possession being guilty, unless explained. (1 Greenlf. Ev., § 34, *State v. Gray*, 37 Mo. 463; *State v. Creson*, 38 Mo. 372); and the evidence adduced fully warrants the instruction.

The third instruction for the State asserts the law, as laid down by our statute, (§ 19, 2 Wag. Stat. 1089,) that where the offender steals property in one county and carries it to another county, he may be indicted and punished in either county. (*State v. Ware*, 62 Mo. 597.) The section referred to is but declaratory of the common law, which regards, in cases of larcenous taking, like the present one, every asportation as a new caption. (3 Greenlf. Ev., § 152 and Cas. Cit.,) and the testimony offered affords ample basis for this instruction. The ordinary instructions as to reasonable doubt, were given both at the instance of the State and of the defendant, and, for the latter, an instruction as to innocence being presumed.

The defendant is not represented in this court, but in discharge of the duty the law imposes, we have examined the record, and there is certainly nothing in the foregoing matters whereof any just complaint can be made. And we think there exists as little ground of objection relative to the second instruction given for defendant, that

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the jury should acquit unless the property were stolen in Greene county. If as is the case, each asportation into another county, is a fresh theft, then there was no conflict between this instruction, and the third one for the State, nor was there any lack of evidence to support the verdict, although that evidence showed an original larcenous taking in Laclede county, and a subsequent asportation into the county of conviction.

The motions, therefore, made after such conviction are clearly untenable, and the judgment must be affirmed.

AFFIRMED.

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SINGLETON v. ST. LOUIS MUTUAL INSURANCE CO. *et al.*,  
*Appellants.*

1. **Insurable Interest: UNCLE AND NEPHEW.** A policy of insurance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy and void. The mere relation of uncle and nephew does not constitute an insurable interest, to enable either to insure the life of the other; *Held*, therefore, where an uncle insured the life of his nephew for his own benefit without having any pecuniary interest in his life, that the policy was void.

**The burden of proving** an insurable interest in the life of the assured lies upon him who claims the insurance.

2. **Life insurance: EVIDENCE: SPITTING OF BLOOD.** In a suit upon a policy of insurance procured by one upon the life of another, for the purpose of showing what was the condition of the latter, when he made his application for insurance, statements made by him which were expressions of his feelings at the time are admissible in evidence, provided they were not made too long before the application to throw light upon the subject. But such statements of his as may have related to prior ill health, are not admissible.

**Parol evidence** is admissible to show in what sense the term "spitting of blood" is used in an application for life insurance.

*Appeal from Audrain Circuit Court.*—HON. G. PORTER,  
Judge.

This was an action on a policy of insurance on the life of John T. Anderson, deceased, payable to the plaintiff on the death of Anderson. The policy was issued on the 12th of December, 1872, and Anderson died on the 20th of April following. The defense was fraud on the part of the plaintiff in procuring the certificate of the medical examiner and the policy, and false representations as to the health of Anderson. The application, on which the policy was issued, contained among others, the following questions and answers: 12. Has the party had, since childhood, consumption, bronchitis, spitting of blood, \*

\* and if so, which? Answer, No. 15. Has the party now, or has he had an habitual cough, or any pulmonary disease, or is any suspected? Answer, No. 18. Is the party now in good health, and free from any symptoms of disease? Answer, Yes. It was one of the conditions of the policy that unless all the answers in the application were true, the policy should be void. The policy was by its terms, payable to John S. Singleton (the plaintiff) creditor, uncle of said John T. Anderson. At the trial Dr. Adams, a witness for defendant, testified that he saw Anderson in the summer of 1872, but did not observe his condition. Defendant's counsel asked what Anderson said to him at that time about his condition, to which plaintiff objected on the ground that it was hearsay, and that witness did not observe his condition. The court sustained the objection. The witness was further asked what statements Anderson made to him at the time he examined him in the spring of 1872, as to his condition and symptoms prior to that time, and as to his having in the past, had spitting of blood or an habitual cough; but the court refused to permit the questions to be asked, ruling that the witness could detail the statements made to him by Anderson as to his condition and symptoms at the time he saw and examined

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him, but not as to his condition at any previous time. Similar questions were also asked of one Hutton, who was not a physician, with like result.

Doctors Ford, Hill, Lee and French, witnesses for the plaintiff, were permitted by the court, against the objections of the defendant, to testify that "spitting of blood" is a medical term, and means spitting of blood from the lungs; and that spitting of blood from the mouth, throat, stomach or nose, is not called by that name by doctors, or in medical books.

The following, among other instructions, asked by defendant, were refused by the court: 10th. To entitle the plaintiff to recover in this action he must show some insurable interest in the life of Anderson, and in the absence of any evidence showing, or tending to show such insurable interest, the jury must find for defendants. 13th. If the jury believe from the evidence that Anderson had at the date of the application, or had had at any time previous thereto since childhood, spitting of blood, from whatever source it originated, they will find for defendants. There was a verdict and judgment for plaintiff, and defendant appeals.

*Henry Flanagan* for appellant.

The question of insurable interest has been before this court several times, and while the decisions seem to differ as to degree or kind of interest necessary to support a policy on the life of another, they are all agreed that unless the beneficiary has some interest in the life of the assured, the policy is void, being a mere wagering contract. *McKee v. Ins. Co.*, 28 Mo. 383; *Charter Oak Ins. Co. v. Brant*, 47 *id.* 419; *Gambis v. Ins. Co.*, 50 *id.* 44; *Chisholm v. Ins. Co.*, 52 *id.* 213; *Evers v. Life Association*, 59 *id.* 429.

The Federal decisions and the decisions of our sister States, with the exception of New Jersey (*Trenton Ins. Co. v. Johnson*, 4 Zab. R. 577,) are uniform, that no person can procure a valid insurance on the life of another unless he

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has an interest in such life. *Lord v. Dall*, 12 Mass. 115; *Loomis v. Eagle Life and Health Ins. Co.*, 6 Gray 396; *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; *Lewis v. Phoenix M. Ins. Co.*, 39 Conn. 100; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35.

While the reciprocal relations of parent and child, and brother and sister have been held, under special circumstances, sufficient to support the contract, there is no decision to be found, in which the mere relation of uncle and nephew has been held sufficient, without other interest in the life of the assured. A man has not an insurable interest in the life of his brother, merely as such, nor has a nephew in the life of his uncle. If a nephew has not an insurable interest in the life of his uncle, *a fortiori* an uncle has not in the life of his nephew. The relationship which implies interest is such only as creates a claim upon the person whose life is insured. An uncle has no claim upon his nephew by reason of their consanguinity.

The declarations offered to be proved were made in May, in the summer, in October and in November of the year 1872. The policy was issued on the 12th of December following. The declarations related to the health of Anderson, and tended to explain his physical condition at the time they were made. The real issue was the state of Anderson's health, at and prior to the time the assurance was applied for, and whether he had ever had certain diseases or affections. Under this issue the defendant had the right to show the condition of Anderson's health at any time during his life, since childhood. Therefore, any fact, tending to prove that he had ever had any of the specified diseases, or that he was not in good health, or free from symptoms of disease at the date of the application, was relevant. *Aveson v. Kinnaird*, 6 East 188; *Ins. Co. v. Moseley*, 8 Wall. 397; *Harriman v. Stowe*, 57 Mo. 93; *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Nat. Mut. Life Ins. Co. v. Applegate*, 7 Ohio St. 392; *Evers v. Life As-*



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sociation, 59 Mo. 429; *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186; *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 225; *May on Ins.*, § 214, p. 226.

The term "spitting of blood" requires no interpretation. The words are plain and familiar, and in no sense technical. The applicant having answered falsely, and thus violated his contract, it was error to allow the plaintiff to introduce evidence restraining or limiting the scope of the question. (*Geach v. Ingall*, 14 M. & W. 95.) No matter what organ the blood came from, the defendant was entitled to a truthful answer. *Campbell v. N. E. M. L. Ins. Co.*, 98 Mass. 381; 1 Green. Ev. §§ 277, 278; 1 Chitty Contracts (11 Am. Ed.) 113; Broom's Leg. Max. 890.

Admitting that the term may have the technical meaning contended for by the respondent, when used by physicians, it does not follow that such was the sense in which it was used by the parties. If extrinsic evidence became necessary to interpret any phrase in the contract, or any term employed there, it ought to have been directed to the intention of the parties, and to the sense attached by them to the language of the contract. The meaning of the particular words, as understood by medical men, was insufficient without some proof that the parties attached the same meaning to them, or that they were usually employed in insurance contracts in that particular sense. *Kirchner v. Venus*, 12 Moore, P. C. R. 361; *Robertson v. French*, 4 East 135; *Pohalaski v. Ins. Co.* 45 How. Pr. 504; S. C., 56 N. Y. 640.

*McFarlane, Jones & Carkener* for respondent.

I. No interest in the life of Anderson in favor of plaintiff was necessary as a matter of law, to validate the policy. Life Insurance is not a contract of indemnity, but a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of certain annual premiums during life. The contract of life in-

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insurance is essentially a *wager* contract, and the wager is lawful at common law. *Dalby v. The India and L. Life I. Co.*, 15 Com. Bench 365; *British Ins. Co. v. Magee, Cook & Alcock*, Repts. (Irish) 182; *Scott v. Roose, Long. & Town*. (Irish) 54; *Shannon v. Nugent*, 1 Hays R. 536-539; *Bunyan on Life Insurance*, p. 11; *Law v. London Indisputable L. P. Co.*, 1 Kay & Johnson, 223; *Rawls v. Ins. Co.*, 3 American Law Reg. (N. S.) see note of Judge Dwight at page 179, par. 2, *et seq.*; *Bliss on Life Insurance*, sec. 3; *Trenton Mutual L. I. Co. v. Johnson*, 4 Zab. (N. Jersey) 576; *Chisholm v. Nat. Cap. L. I. Co.*, 52 Mo. 213.

2d. The position that public policy would avoid such contract was taken in the cases cited above—especially the Irish cases, also in the English cases prior to the statute requiring an interest, and was rejected. See cases cited above, and *Crawford v. Hunter*, 8 Term R. 13; *Buchanan v. Ocean Ins. Co.*, 6 Cow. 318.

This argument, if good at all, would cut up life insurance by the roots; for the temptation where there is an interest, especially a pecuniary one, would be perhaps quite as strong to bring about the event insured against, as where none existed. See note Judge Dwight par. 2, p. 180-81, American Law Register (N. S.) vol 3. But this is a theoretical question in this case, as far as the *fact* of an "interest is concerned," since the policy itself recites that plaintiff was a *creditor*, and also an uncle of the assured.

3d. But if it be held that plaintiff must have an interest in the life assured, in order to validate the policy, it would seem plain that generally, and especially in this case, where the issuing of the policy stands admitted by defendants, and upon its face the policy expressly affirms that plaintiff had an interest—was a creditor, and was the uncle of the assured, the want of such interest would be, upon every principle of logic and good pleading, a matter of defense.

As settled in the Chisholm case, the absence of an interest in the life assured on the part of the beneficiary, will

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avoid the policy (if it have that effect at all) only on the grounds of public policy. Now the law does not presume that any contract fair on its face is illegal and void for any cause whatever. The extrinsic matter making it so must be pleaded by defendant. Especially is this so with defenses based on public policy. *Peltz v. Long*, 40 Mo. 532; *Sumner v. Summers*, 54 Mo. 340; *Cheltenham v. Cook*, 44 Mo. 29; *Sherwood v. Saxton*, 63 Mo. 78-84; *Gardner v. Armstrong*, 31 Mo. 535; *Shannon v. Nugent*, 1 Hays 536; *Lewis v. Phoenix M. Ins. Co.*, 39 Conn. 100.

4th. But the company having asked questions on this subject and received answers, and acted on them and issued the policy, wherein it is affirmatively set out that plaintiff had an interest—was a creditor, the company has thereby shifted the burden of proof upon its own shoulders, as the maker of a note does by the "value received." The burden is on the defendant to show the falsity of the answers given to questions asked by the company. *Piedmont & Arlington L. I. Co. v. Ewing*, 3 Central Law Jour. 686; *Evers v. Life Asso. America*, 59 Mo. 431.

II. There was no error in the exclusion of the alleged statements of deceased, which were mere recitals of antecedent events, or of his prior condition. That his declarations made to a witness at any particular time, as to his then condition, when such declarations were accompanied with some observation by the witness of signs of ill health in the assured, are admissible as a part of the *res gestae*, the circuit court ruled, and all such testimony offered by defendants were received. This is the farthest extent to which the authorities go. See *Marr v. Hill*, 10 Mo. 320; *Wadlow v. Perryman*, 27 Mo. 279; *Harriman v. Stowe*, 57 Mo. 93; *Ladd v. Couzins*, 35 Mo. 513-516; 1 Greenleaf Ev. Sec. 110; *Swift v. Ins. Co.*, 63 N. Y. 186.

III. The court rightly permitted plaintiff in rebuttal to show that the words "spitting of blood" constitute a medical and technical term, and also the meaning of such term.

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1st. No one can doubt, after an inspection of the question asked, that this was a medical term, among medical terms, denoting specific diseases. But plaintiff proved by physicians that it was such, and then proved the meaning of these words when used as such medical term. This was plaintiff's undoubted right. *Reid v. Piedmont Ins. Co.*, 58 Mo. 421; *Campbell v. N. E. Ins. Co.*, 98 Mass. at page 406; 1 Greenleaf Ev. sections 280 and 295; *Blair v. Corby*, 37 Mo. 313; *Price v. Phoenix Ins. Co.*, 17 Minn. page 517-18. Then it is left to the jury to say whether in this question these words were used in the sense of the technical term.

2d. To arbitrarily hold that this phrase (evidently a medical term with a distinct meaning) is not (even if the jury should find that it was so intended by the parties to the application) to be understood in the sense of such term, is to permit the company to lay a trap for the unwary, and to outrageously take advantage of its own wrong, in not asking the plain question: "Has he ever spit any blood?" if it required the applicant to answer as to any expectoration of blood. It is settled that a policy of insurance will be construed strictly against the company. "The language must be taken most strongly against the insurers, for it is their own language and for their own benefit. It shall not defeat the policy except in a case of plain necessity." May on Insurance, pp. 182-3, Secs. 175 and 176. "When the words are without violence susceptible of two interpretations, that which will sustain the policy, must in preference be adopted." *Westfall v. Hudson Ins. Co.*, 2 Duer 495; *Pelly v. Royal Ex. Co.*, 1 Burr. 341. "A construction must necessarily be excluded by the language used, to prevent the court from adopting it, if it will save the policy." *Westfall v. Hudson Ins. Co.*, 2 Duer at p. 495.

R. W. Jones for respondent.

The idea of a creditor's having pecuniary interest in the life of any free person, is absurd. The most that can

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be said is, that there is a bare possibility of the creditor's getting more of his debt if the debtor live than if he die. It cannot be called even a probability, because this would depend, not only on his life, but on his habits, his trade or profession, and that peculiar talent which accumulates and saves money. There being no pecuniary interest in the life, there could be no pecuniary loss in the death. The same argument applies to the dependant relative. There is then nothing in the nature of the contract which requires an interest in the life. But the question of public policy arises. It would be against public policy to allow any contract which was in violation of law, or which would directly induce the commission of crime.

But do wager policies induce crime? There is no obligation in them relating to crime; no illegal consideration; nothing looking to crime; crime is not contemplated in them. A creditor has a policy on the life of an insolvent, improvident debtor. A creditor has a policy on the life of his debtor who afterward pays the debt. A wife or child takes insurance on the husband or father. Here the same inducements exist to commit crime as do exist in wager policies. Therefore, if public policy is against wager contract, it also prohibits these. But such contracts are permitted by the laws of this State. Therefore, wager policies, being no more inducive to the commission of crime than these, and the inducements being the same, are allowed here. There is nothing in logic to sustain the doctrine of insurable interest. The tendency of the courts, of late years, has been toward avoiding and doing away with it.

HENRY, J.—Plaintiff sued defendants on a policy of insurance issued by the St. Louis Mutual Life Insurance Company, on the life of John T. Anderson, procured by plaintiff, who paid the premiums, and was to receive the amount for which said life was insured by said company, on the death of said Anderson.



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Plaintiff was an uncle of Jno. T. Anderson, but it was neither alleged nor proved by plaintiff, that he had any pecuniary interest in his life, and the mere relation of uncle and nephew does not constitute an insurable interest, to enable either to insure the life of the other. It is maintained with great ability by Messrs. McFarlane and Jones, attorneys for plaintiff, that a policy of insurance, effected by one on the life of another in which he has no pecuniary interest, is valid; and they rely upon *Chisholm v. Nat. Capitol Life Ins. Co.*, 52 Mo. 213, in which this court, Wagner, J., said: "In this State we have no statute on the subject covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in anywise against or contrary to public policy." These remarks of course, are to be restricted to the case then under consideration. The plaintiff there had insured the life of Clark, between whom and herself there was a marriage engagement, and the court held that she had a pecuniary interest in the life of Clark, remarking that "had he observed and kept the same, (his contract of marriage) then, as his wife, she would have been entitled to support. Had he lived and violated the contract, she would have had her action for damages." There are intimations in the opinion which support the views urged by respondent's attorney, but they are *obiter dicta*. The case of the *Trenton Mut. Life and Fire Ins. Co. v. Johnson*, 4 Zab. 576, is approvingly cited by the court, but a different doctrine from that announced in that case has been held in Massachusetts, New York, Connecticut, Maine, Rhode Island, Indiana, by the Supreme Court of the United States, by Dillon, J., in *Swick v. Home Ins. Co.*, 2 Dillon 161, and in this State in *McKee v. Ins. Co.*, 28 Mo. 383. And in *Gamb v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44, it was held indirectly that a person procuring an insurance on the life of another must, to make it valid, have a pecuniary interest in the life insured. In the latter

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case, Bliss, J., said: "Gambling, or wager policies, are those where the persons for whose use they issue have no pecuniary interest in the life insured. But the wife has a direct interest in the life of her husband." In the former case, Scott, J.: "There is nothing in the contract as stated in the petition, which shows it to be a wagering one, or in anywise contrary to public policy."

He then proceeds to show, that the plaintiff had a pecuniary interest in the life of the husband, which she insured for her benefit. In *Evers v. The Life Association*, 59 Mo. 430, Wagner, J., who delivered the opinion of the court, did not seem entirely satisfied with *Chisholm v. Nat. Capitol Life Ins. Co.* He said: "Our opinion on this subject was expressed in *Chisholm v. Nat. Capitol Ins. Co.*, 52 Mo. 213, to some extent, but it is not necessary to examine the question further in this case, as the plaintiff's own instructions assume that such an interest is necessary." As the observations of our court on this subject, in the case referred to are *obiter dicta*, the question may be considered an open one in this State. In his Commentaries, 3 Vol., 462, Chancellor Kent, said: "But policies, without interest upon lives, are more pernicious and dangerous than any other class of wager policies, because temptation to tamper with life is more mischievous than incitement to mere pecuniary fraud." In *Lord v. Dall*, 12 Mass. 115, it was held "that unless the assured had an interest in the life insured, it would be a mere wager policy, which we think, would be contrary to our laws, and therefore void." In *Stevens adm'r v. Warren adm'x*, and another, 101 Mass. 564; *Lord v. Dall*, was cited and approved, and Willis, J., speaking for the court, said: "The general rule recognized by the courts has been that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life." To the same effect are the cases of *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; *Lewis v. Phœnix Mut. Life Ins. Co.*, 39 Conn. 101; *Bevin v. The Con. Mut. Life Ins. Co.*, 23 Conn. 244; *Mowry v. Home Life Ins. Co.*,

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9 R. I. 346; *Franklin Life Ins. Co. v. Hays*, 41 Ind. 117; *Ruse v. Mut. Benefit Life Ins. Co.*, 23 N. Y. 516; *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. 247; *Cammack v. Lewis*, 15 Wallace, 643; *Swick v. Home Ins. Co.*, 2 Dillon R. 161; May on Ins., sec. 587, page 724.

Neither the case of *Shannon v. Nugent*, Hays' Reports of cases in the Irish Court of Exchequer, page 539, nor *Ferguson v. Lomax*, 2 Drury & Warren's Reports of cases decided in the English High Court of Chancery, cited in *Chisholm v. Nat. Capitol Life Ins. Co.*, *supra*, sustains the doctrine contended for by respondent. In the latter case the question was neither considered by the court nor presented in the brief of counsel, and in the former, Joy, C. B., speaking for the court, said: "It is not now necessary for us to decide whether a life insurance, made in Ireland must be on interest." He stated, however, that the leaning of the court was, that interest was not necessary to give it validity. We feel constrained, therefore, by the weight of authority to hold that the policy of insurance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy, and therefore void. This policy upon its face, does not state an interest, nor in the application is it stated that Singleton had a pecuniary interest in the life of Anderson. The following question was propounded to the applicant: "Has the beneficiary (if a creditor) an interest in the life to be assured, to the full amount of this application?" To which he answered "No." He does not state that he is a creditor. It was neither averred, in the plaintiffs' petition nor proved, that plaintiff had any pecuniary interest in the continuance of the life of John T. Anderson. The following instruction, asked by defendant, the court refused: "That to entitle plaintiff to recover in this action, he must show some insurable interest in the life of John T. Anderson, the insured, and that in the absence of any evidence, showing, or

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tending to show such insurable interest, the jury must find for defendant."

Plaintiff's counsel contend that it devolved upon defendant to show that plaintiff had no such interest, and several cases from our own reports are relied upon as authority for this position. In the earlier of these cases all that was determined was that when a contract was good at common law, without being reduced to writing, after the passage of the statute of frauds it was matter of defense to be pleaded that the contract was not in writing; The case here is of a contract void at common law, upon its face, and of course it devolves upon plaintiff to show such facts as render it valid and binding. In *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. *supra*, the court said: "It must be considered as well settled at present that at common law, as well as under the statute of betting and gaming, a policy of fire insurance is void, unless the party has at the time an insurable interest. It follows that a complaint in an action on the policy, must contain an averment of such an interest, in order to state a cause of action." "The plaintiff must aver an insurable interest, or if he has not that, the grounds upon which he rests his right to sue." May on Insurance, Sec. 587. In *Ruse v. The Mutual Benefit Life Ins. Co.*, *supra*, in which the opinion was delivered by that able jurist, Judge Selden, the court said: "And it is apparent from the authorities, that it had always been previously held in suits upon policies, not containing the words, 'interest or no interest,' or other equivalent words, that the plaintiff must aver and prove that he had an interest." This was said in reference to *Depaba v. Ludlow*, (Comyn 361,) which shows how the doctrine that wagering policies upon ships are valid, originated. The defendant there had insured the plaintiff, "interest or no interest," and it was held that the import of that clause relieved plaintiff from proving his interest. That the plaintiff must, in these cases, aver and prove an interest, was held in the Supreme Court of Illinois, in *Guardian M. L. Ins. Co. v.*

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*Hogan*, 80 Ill. 35, and that he must prove the same affirmatively as a part of the case.

The court below erred in refusing to give defendant's tenth instruction, and for that error the judgment must be reversed. The court did not err in excluding statements made by John T. Anderson, as to how he had been afflicted, and did properly admit statements made by him to witnesses, whether medical men or not, which were expressions of his feelings at the time. *Greenlf. on Ev.*, Vol. 1, Sec. 101. Nor was it necessary to make such statements admissible that they should have been made in answer to inquiries as to his health, or observations of others as to his appearance, &c. But they must not have been made too long before the application to throw any light upon the condition of his health when the application was made. We think evidence properly admissible to show in what sense the term "spitting of blood," was used in the application. Without any evidence of the meaning of that term, the court might properly have instructed the jury that "spitting of blood," in consequence of a drawn tooth, or a cut on the gums, was not meant by that term, and yet if Anderson had spit blood from such trivial causes, literally his answer to the question, would have been false. There was, therefore, a propriety in the admission of evidence of the meaning of the term. There is something ambiguous in the term spitting of blood. There is room for interpretation. Literally, the meaning is spitting blood, whether from the teeth, gums or lungs, but it would be absurd to hold that it was used in that sense in the application. We have given two instances of spitting blood, which no court would hold as embraced within the terms "spitting of blood," as used in that application. Hence, the necessity for an explanation; "spitting of blood," is, and was proved to be a technical term. Other errors are assigned, but it is unnecessary to consider them. We are all agreed that the judgment should be and it is accordingly reversed, and the cause remanded. REVERSED.



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Wayne County v. St. Louis & Iron Mountain R. R. Co.

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WAYNE COUNTY v. THE ST. LOUIS & IRON MOUNTAIN R. R.  
Co., *Appellant*.

**Practice in the Supreme Court:** EVIDENCE. A judgment will not be reversed because of the admission of improper evidence upon the trial, where it was introduced and read without objection; nor where, if reversed, the evidence would be competent upon a subsequent trial.

*Appeal from Wayne Circuit Court*—HON. R. P. OWEN,  
Judge.

*Thoroughman & Warren and W. R. Donaldson* for appellant.

The certificate of the Auditor is no evidence of the action of the of Board Equalization, and was not intended by the act to serve such a purpose. Sess. Laws 1871, page 56.; *Washington County v. St. Louis & I. M. R. R. Co.*, 58 Mo. 378; The act in relation to taxation of railroads, approved March 15, 1875, is a legislative construction of the act of 1871, to the effect above stated. Sess. Acts 1875, p. 122, § 11.

*J. W. Emmerson and J. P. Dillingham* for respondent.

1. Objections to evidence must be made at the time it is offered, and the ground of the objection must be stated or the objection cannot be considered by this court. *Ramsey v. Waters*, 1 Mo. 406; *Fields v. Hunter*, 8 Mo. 128; *Waldo v. Russell*, 5 Mo. 387; *Withington v. Young*, 4 Mo. 564; *Connoly v. Pendergast*, 33 Mo. 577.

2. Even if this court should still think that the certificate was insufficient at the time it was used in the court below, and as the law then was, still it is sufficient as the law now is.

NAPTON, J.—This case was tried in October, 1874. The suit was one brought by the county to recover certain

taxes levied by the county court for 1872, upon the defendant's property in Wayne county, based upon the certificate made by the Auditor at Jefferson City, under the 11th and 12th sections of the act of March 10th, 1871. Upon the trial the Auditor's certificate was introduced and read without objection. After verdict, a motion for new trial was made, alleging among other reasons, that improper evidence was allowed.

It is now insisted that as the Auditor's certificate was declared a nullity so far as the Board of Equalization is concerned, by the decision of this court in *Washington County v. The St. Louis & I. M. R. R. Co.*, (58 Mo. 378,) and the certificate in this case is identical in form with the one offered and admitted in that, it follows that the judgment in this case must be reversed. We are not of this opinion for two reasons.

In the first place, no objections were made at the trial to the introduction of the Auditor's certificate. Had objections been made and sustained, we cannot see that competent evidence might not have been introduced to establish what the certificate was offered to establish. It is well settled in our practice, that the bill of exceptions must show that the evidence offered was objected to at the time it was offered, and in several cases it is held that the objections must be specifically stated. 37 Mo. 338; 39 Mo. 222; 40 Mo. 356. But apart from this, in March, 1875, shortly after the decision in *Washington Co. v. St. L. & I. M. R. R. Co.*, the Legislature enacted that these certificates of the Auditor "should be held and received in all courts and places where the action of said Board of Equalization may be called in question, as *prima facie* evidence of the facts as set forth in the certificate, and that each and every act required to be done by said Board, under the provisions of this act had been fully complied with, and the party using or offering such certificate in evidence shall not be required to produce the record of the proceedings or decisions of said Board, or copy thereof, nor any other matter or thing

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to sustain such certificate." Why then send the case back for a new trial, when it is plain that in such trial the Auditor's certificate would be admissible?

We may, however, go back to a very early period of our judicial history, and find that from the beginning a party objecting to testimony must do so at the time it is offered, and state his objections. In *Ramsey v. Waters*, 1 Mo. 287, (406) Pettibone, J., observes: "As to the last point, that the bill of sale was improperly rejected, the bill of exceptions does not state the ground on which it was rejected. It might be that the plaintiff did not offer to prove the execution of it. If so, it was properly rejected. As this proof necessarily precedes its being offered in evidence, we cannot see but that it was very properly excluded." In *Waldo v. Russell*, 5 Mo. 393, Judge Tompkins observes: "That it was the duty of the defendant to object, in the progress of the suit, to each particular point of the evidence which he deemed objectionable. The plaintiff might, perhaps, have been able to cure a defect or to find other evidence." In *Fields v. Hunter*, 8 Mo. 131, it was observed: "It does not appear from the bill of exceptions that any objections to the instrument offered in evidence on any specific ground, were made in the circuit court, and this court has heretofore intimated its views of the spirit of the rule prescribed by the Legislature, that only such points shall be reviewed here as were decided on by the court below. It is manifest that unless the party points out specific objections in the circuit court, and the bill of exceptions shows what these objections were, the case may be decided on one point in the circuit court, and reversed on another by the appellate court." *Dickey v. Malechi* 6 Mo. 186; *Frost v. Fryor*, 7 Mo. 316. We refer to these early decisions merely to show that the more recent ones heretofore referred to have always been the doctrine of this court. The judgment must therefore be affirmed. The other judges concur.

AFFIRMED.

SENSENDERFER, *Appellant* v. SMITH *et al*

1. **Evidence, Parol:** RECORDS. Parol evidence, in order to overcome record evidence, should be of the most unquestionable and conclusive character.
2. **Purchase with Notice: TRUSTEE: ESTOPPEL.** Defendants' grantor entered a tract of government land, and took from the receiver of the local land office a receipt for the purchase money, describing the land. By a mistake of the officer the records of the General Land Office at Washington were made to show an entry of a different tract, and a patent was issued accordingly. The records of the local office were afterwards destroyed by fire. Without taking actual possession defendants' grantor claimed to be the owner of the tract designated in the receipt. Nevertheless, for a period of seventeen years he permitted the other tract to be assessed to him for taxation, and during a part of the time at least, paid the taxes on it. The tract described in the receipt never was assessed to him. Plaintiff knew that defendants' grantor had intended to enter that tract, and that he claimed title to it. Finding, however, that the government records showed it to be vacant and subject to entry, plaintiff purchased and obtained a patent for it in his own name. Neither the defendants nor their grantor ever took any step to have the mistake corrected until after the issue of the patent to plaintiff; *Held*. 1st, That these facts were not sufficient to put plaintiff on inquiry, or to affect him with notice of a title in defendants, or to constitute him a trustee for them; 2d, That defendants had acquiesced in the entry as made, and were estopped to claim title to the other tract.

## NAPTON AND NORTON, J J., DISSENTING.

*Held*, that the question which tract defendants' grantor had in fact entered, was a judicial question: that the decision of the land officers of the government and the issuing to him of the patent for the other tract was not conclusive on him or his grantees, and that plaintiff took the title as trustee for them.

*Appeal from Johnson Circuit Court.*—HON. FOSTER P. WRIGHT, Judge.

*H. B. Johnson and Snoddy & Short* for appellant, cited U. S. Rev. Stat., §§ 2469, 2470, 2355; Wag. Stat. 592, § 15; 1 Green. Ev., § 558; Bull. N. P. 254; *Rex v. Castleton*, 6 T. R. 236; *Doe v. Pulman*, 3 Ad. & El. (N. S.) 622; *Alien*

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*v. Furnival*, 1 C. M. & R. 292; 1 Phil. Ev. (5 Am. Ed.) 485; U. S. Rev. Stat., §§ 2369 to 2372; *Johnson v. Towsley*, 13 Wall. 72; *Allison v. Hunter*, 9 Mo. 749; *Bodley v. Taylor*, 5 Cranch 191; *Brush v. Ware*, 15 Pet. 93; 1 Sto. Eq. Jur., §§ 146, 147 and note; 1 Phil. Ev., pp. 567 to 585, 592; Lester's Land Laws, Vol. 1, pp. 311, 322, 325, 327; *Harper v. Scott*, 12 Geo. 125; *Griffith v. Deerfelt*, 17 Mo. 31; *Bagnell v. Broderick*, 13 Pet. 436; *Wilcox v. Jackson*, Ib. 498; *Leblanc v. Ludrique*, 14 La. An. 772; *Sweatt v. Corcoran*, 37 Miss. 513; *Bledsoe v. Little*, 4 How. (Miss.) 13; *Carter v. Spencer*, Id. 42; *Harris v. McKissack*, 34 Miss. 464; *Maxey v. O'Conner*, 23 Tex. 241; *Dickinson v. Brown*, 9 Sm. & M. 130; *Boggs v. Merced Co.*, 14 Cal. 279; *Leese v. Clark*, 18 Cal. 535; *Waterman v. Smith*, 13 Cal. 373; *Lebeau v. Armitage*, 47 Mo. 138; *Enfield v. Day*, 11 N. H. 520; *Enfield v. Permit*, 8 N. H. 512; *Bellows v. Copp*, 20 N. H. 492; *McCaughal v. Ryan*, 27 Barb. 376; *Doe v. Craft*, 1 Kerr N. B. 546; *Robinson v. Leake*, 14 Iowa 421; *Barry v. Gamble*, 8 Mo. 88; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328; *Minter v. Crommelin*, 18 How. 87; *Steiner v. Coxe*, 4 Pa. St. 13; *Hill v. Miller*, 36 Mo. 182; *Willot v. Sanford*, 19 How. 79; *Cavender v. Smith*, 8 Iowa 360.

*Crittenden & Cockrell and J. J. Cockrell* for respondents, cited Lester's Land Laws, p. 47; 1st Story's Eq., Sec. 165; *Rhodes v. Outcalt*, 48 Mo. 367; *Wickersham v. Woodbeck*, 57 Mo. 61; *Aldrich v. Aldrich*, 37 Ills. 32; *Brill v. Stiles*, 35 Ills. 305; *Goolsbee v. Fordham*, 49 Ala. 202; *Ventress v. Smith*, 10 Pet. 161; *Warren v. Van Brunt*, 19 Wall. 646; *Trulock v. Taylor*, 26 Ark. 54; *Carroll v. Safford*, 3 How. 461; *Witherspoon v. Duncan*, 4 Wall. 218; *Stark v. Starrs*, 6 Wall. 408; *Hedrick v. Hughes*, 15 Wall. 123.

HENRY, J.—This is a suit in ejectment by plaintiff, to recover the nw qr. of the se qr. of Sec. No. 35, in township 48 and range 24 in Johnson county.

The defendants make an equitable defense, stating in



their answer, that, on the 19th of July, 1854, one B. F. Dunkley, under whom they claim, entered the land in question at the United States Land office, at Clinton, Missouri, paid the purchase price, and received from the receiver of the land office, a receipt for fifty dollars, the amount of the purchase money, in which it was stated that it was the consideration money for the land in question, and that he, thereupon, immediately took possession of said land, and continued in possession thereof, until he conveyed it to defendants, who have been in possession ever since the conveyance to them. They further allege, that when Dunkley entered said land, the register of the land office at Clinton made due entry of such fact upon the records of said office, and thereafter evidence of such entry was kept at the land office at Boonville, Missouri, and in the office of the recorder of deeds, and county clerk's office for Johnson county; that after said entry by Dunkley, the building in which the land office was kept at Warsaw, Missouri, to which place the office had been removed from Clinton, was consumed by fire, together with all the records, plats and plat-books of the government pertaining to the land office in said land district, and that afterwards, either by mistake or otherwise, the records manufactured for and supplied to said land office, after the fire at Warsaw, erroneously "exhibited, that the tract of land in controversy, was vacant and unentered," and that said Dunkley had entered other and different parcels in said section, but not the nw qr. of the se qr.; that said Dunkley and defendants were ignorant of such false entries, until informed by plaintiff that he had entered said land. They charge that plaintiff, when he entered said land, knew that defendants were living on and cultivating the same, and that Dunkley had entered the land. Plaintiff, in his replication, denied the allegations in defendant's answer. The court, after hearing the evidence, found for defendant and rendered a judgment accordingly, from which plaintiff has appealed.

The main questions to be considered are:

1st. Did Dunkley enter the land in controversy in July, 1854?

2d. If he did, had plaintiff notice of that fact, or of such facts, as in equity are equivalent to notice of that principal fact?

The evidence relied upon by defendants to establish the entry of the land by Dunkley in 1854, is oral, and must be of sufficient weight to overcome the record evidence to the contrary, furnished by the plat-book of the land office at Warsaw, the record of the land department at Washington and the patent of the United States issued to plaintiff, before a court of equity would be warranted in holding plaintiff as a trustee for Dunkley or his grantees. It appears, from the evidence, that the office was taken from Clinton to Warsaw, where the records of the land office for that district were consumed by fire, but when the office was afterwards moved to Boonville, these records were supplied from the general land office at Washington, which showed the land in question to be vacant.

The records of entries of land in the several land districts are made at the general land office, from monthly and quarterly reports of the registers and receivers, and from duplicate receipts for land entered, forwarded by the land district officers to the general land office. The register and receiver of the land office at Clinton certified to the general land office the entries made in July, 1854, and the tract in question was not embraced in that monthly report, or in any monthly or quarterly report made from July, 1854, to September, 1871, when the patent for the land was issued to plaintiff. We have said that the records of the land office at Clinton furnished evidence that the land in question had not been entered. It is true, that Faulk, a witness for defendants, testifies that he saw the register at the land office, when he entered the land for Dunkley, write the name of B. F. Dunkley on the plat-book, on the space which indicated the tract in question, and that Keen, another witness for defendants states, that

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in the latter part of September, 1854, he went in person to the land office at Clinton, and entered eight forty acre tracts in section 35, and then saw on the plat-book of said land office, the tract in controversy, marked as "entered."

On that plat, the ne qr. of the se qr., of section 35, was marked as entered by Dunkley. In November, 1854, a patent was issued to Dunkley for the ne qr. of the se qr. Dunkley testified that he never entered that forty. The plat-book at Boonville also showed that forty entered by Dunkley. If he did not enter that, instead of the nw qr. of the se qr., and it be true, as Keen and Faulk stated, that the plat-book showed the latter as entered by Dunkley, how did it happen that both the ne qr. and the nw qr. were marked on the plat-book as entered by Dunkley? And how did the alteration on the plat-book afterwards occur, showing the nw qr. of the ne qr. vacant? No conceivable motive for making such an alteration can be ascribed to the officers of the land office, for neither of them, nor any one connected with them, profited by the alteration, and the land for years after, appeared vacant on the plat-book. These witnesses are testifying from memory, to facts contradictory of record evidence, and their testimony to overcome it, should be of the most unquestionable and conclusive character. Mr. Keen says that he knew that Dunkley desired to enter this tract of land. He knew that his brother-in-law, Faulk, went to Clinton to enter it for Dunkley. He knew that Faulk was very familiar with the land in that section, and the boundaries and corners of its subdivisions, and that when Faulk returned, Faulk showed him the duplicate receipt, which he read and remembers, that it showed the entry of this identical forty. He says it also showed that it had been entered for Dr. Dunkley by Faulk.

The duplicate receipt for the purchase money for the ne qr. of the ne qr. forwarded to the General Land Office from the Clinton office, read in evidence by plaintiff, does not show that Faulk had any connection whatever with

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the entry; and it will be borne in mind that defendants' theory is that the tract was embraced in the duplicate sent to Washington instead of the tract in controversy. When Keen testifies, after the lapse of twenty-three years, to the contents of that duplicate shown him by Faulk, it is charity to suppose that he has mistaken the impression made upon his mind, by his knowledge, that Dunkley wanted to enter that tract, and that Faulk went to enter it for him, for a recollection that the duplicate described the land in controversy. Faulk's testimony, that he saw the register mark this tract on the plat, as entered, is contradicted by the record. That he saw him mark a tract as entered on that occasion, we have no doubt, but in the light of other facts, which are indisputable, we are satisfied that it was the ne qr. of the ne qr. that was so marked, and that the witness is mistaken. The register did not then mark two tracts as entered, and in about two months from the date of that entry the patent for the ne qr. of the ne qr. was issued to Dunkley. Dunkley testifies that his receipt is lost or mislaid, but is positive that it described the tract in controversy. He, too, testifies from memory, as to the contents of that receipt.

The clerk of the county court of Johnson county testifies that the land in question was assessed to Dr. Dunkley from 1867 to 1874, inclusive, and never before 1867, and that the ne qr. of the nw qr. was assessed to him from 1856, two years after his entry, to 1874, a period of eighteen years, and that he paid the taxes thereon for 1873 and '74. It does not appear whether he had paid taxes before 1873. How did it occur that the ne qr. of the nw qr. was assessed to Dunkley as early as 1856, and down to 1874? Either Dunkley gave it in to the assessor as his land, or the assessor ascertained from the records in Johnson county, that Dunkley owned it. In 1866 a certificate was procured from the land office at Boonville, and kept afterward in the recorder's office of Johnson county, showing that Dunkley entered the nw qr. of the se qr. July 19th, 1854,

and for the first time in the following year, it was assessed to Dr. Dunkley. That this certificate so procured from the Boonville land office was untrue, is shown by certified copies of the Boonville plat-book, and the records of the general land office at Washington. From the fact that the ne qr. of the se qr. was assessed to Dunkley in Johnson county, where he resided from 1856 to 1874, and that the nw qr. of the se qr. was not assessed to him, it is a fair inference, either that prior to 1866 there was in the recorder's office of Johnson county a certified copy of the plat-book of the land office, showing that Dunkley owned that land, and not showing that he owned the land in controversy, or that he included the former tract in the list of lands owned by him, given by him to the assessor.

To sustain the issue for defendants, on this branch of the case, we are to find that at least three mistakes and one crime were committed by the register or receiver of the land office at Clinton and Warsaw.

1st. A mistake in the duplicate retained at the office, of the receipt given to Dunkley for the land he entered, in the description of the land sold to Dunkley.

2d. That mistake having been carried to the plat-book, was afterward corrected by marking as entered, the tract in question, and the register, by mistake, failed to erase the remark "entered" on the ne qr. of the sw qr., and permitted it to remain marked as "entered."

3d. In reporting the lands entered in July, 1854, to the general land office, a mistake was again made as to the tract entered by Dunkley, and the ne qr. of the sw qr. reported as entered by him; and the crime committed was in subsequently allowing the plat-book to make it show the nw qr. of the sw qr. vacant.

On the other hand, that Faulk made a mistake and applied to, and did enter the ne qr. instead of the nw qr. of section 35, solves the whole difficulty, and is established, we think, by a preponderance of evidence. From the facts thus stated, what is the conclusion? Clearly, that while



Dunkley may have desired to enter the tract in question, and Faulk may have intended to enter it for him, he made a mistake at the land office, and applied for, and entered the ne qr. of the nw qr. instead. If this be a correct conclusion from the evidence, it settles the controversy in favor of the plaintiff.

But suppose it be true that Faulk, for Dunkley, did enter this very tract, and the officers and agents of the government gave him a receipt for the purchase money for the identical tract, but made a mistake in the duplicate retained by them, and described another tract, and carried that mistake into the plat-book, is there sufficient evidence in this record to charge plaintiff with notice of these facts?

It is alleged in the answer of defendant that Dunkley, immediately after his entry of this land in 1854, took possession of it. The evidence shows conclusively that he did not take actual possession until 1871. He testifies that it was not inclosed until 1871; that the first crop raised upon it was in 1873. He had no actual possession until 1871, and no constructive possession prior to 1871, for the title remained in the government of the United States. If he had been in actual possession, claiming title, a very different question would have been presented on this branch of the case from that we have to deal with. Plaintiff might then have been put upon his inquiry, and affected with notice of Dunkley's equity against the government. But what are the facts relied upon as constituting notice to plaintiff? That he knew that Dunkley claimed the land, and that in a conversation with Faulk, after plaintiff had received his patent for the land from the government, he remarked to Faulk, who was proceeding to give him an account of the entry made by him for Dunkley in 1854, that he knew that Dunkley intended to enter this tract, but made a mistake and entered the other forty. Now, what knowledge did that remark imply? That Dunkley had entered the nw qr. of these qr.? and that is the knowl-

edge he must have had to hold him as a trustee. On the contrary, it implies that he knew that Dunkley, instead of entering that, had entered the other tract. Did the knowledge of the fact that Dunkley claimed the land, impose upon the plaintiff, before he could acquire a title from the government, the duty of going to Dunkley to ascertain what title he had, and affect him with notice of any equity he may have had against the government? Take the facts as they are clearly proven. The records of the land offices of the government, both at Boonville and Washington, showed this land to be vacant. A purchaser goes to the office at Boonville, knowing that an individual, not in possession of the land, claims to own it, and then finds that it is vacant and subject to entry. What could he have learned from Dunkley, if he had gone to him, and Dunkley had told him the whole truth? Certain facts resting in his memory, contradicting the records of the general and local land offices, and he not in possession of the land he claims to have owned since 1854, but claiming the very land which he says was reported by mistake or fraud, as the land he entered; for permitting it to be assessed to him annually for seventeen years, amounted to asserting ownership; and this, it is insisted, makes the patentee a purchaser at his peril, and a trustee for the plaintiff.

It is evident that if Dunkley intended to enter, and Faulk for him did enter the nw qr. of the se qr., and by mistake it was not so entered upon the plat-book, or reported to the general land office, yet the ne qr. of the nw qr. was certainly with his knowledge, assessed to him from 1856 to 1874, and for seventeen years he must have been apprised of the fact: that this mistake had been made, and not until plaintiff had entered the land did he make complaint, or take any steps to have it corrected. His own testimony shows that he knew that he had not purchased the ne qr., but had purchased the nw qr. The ne qr. was assessed to him for thirteen years, and for no year in that period had the nw qr. been assessed to him. Is he not to

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be taken to have acquiesced? Shall he, for seventeen years hold the ne qr; have it assessed to him, pay taxes on it for 1873 and 1874, and then claim that there was a mistake, and, in a court of equity, have the purchaser from the government of the tract he intended to enter, divested of his title, on the evidence preserved in this record? We think not, and the judgment is reversed and the cause remanded. Judges SHERWOOD and HOUGH concur.

REVERSED.

NAPTON, J., DISSENTING.—This was an action of ejectment for the nw qr. of the se qr., of Sec. 35, T. 48, R. 24. The suit was brought in the circuit court of Johnson county in 1873—it was tried in 1875. The plaintiff's title was a patent for the land issued on the 15th of September, 1871. The defense was, that one Dunkley, the father of Mrs. Smith, &c., the nominal defendants, bought of the United States, at the Clinton land office, this same piece, on July 19th, 1854. The defendants, therefore, asked the court that the legal title acquired by the plaintiff in 1871 be divested out of him and vested in the defendants.

After hearing all the testimony in the case, the circuit court made a decree in conformity to the prayer of the defendants, and from this decree the plaintiff appeals to this court. The testimony in this case is voluminous and presents a state of facts not easily accounted for, and has, therefore, from the importance of the principle involved, and the unusual and singular discrepancies occurring in the records of the United State Land Offices at Clinton, and Warsaw and Boonville, and of the general land office at Washington, been examined with care, although the result reached is not one in which all the court is agreed.

It is hardly necessary for me to repeat the testimony offered by the defendant to establish the fact that, on the 19th of July, 1854, he entered at the land office at Clinton the nw qr. of the se qr., S. 35, T. 48 R. 24, and received a certificate from the United States officers to that effect. If

any reliance is to be placed on human testimony, that fact is established beyond doubt. Dr. Dunkley sent the money by Capt. Faulk to enter the piece of land, and Faulk swears he entered it and received the receiver's receipt, and Mr. Keen, who was in Clinton shortly afterward, testifies that he saw this 40 marked entered on the plats in the office. Dr. Dunkley testifies that he received the certificate for the piece of land now in controversy. All these witnesses were perfectly familiar with the land in question, and knew the boundaries of all the land in the section, and the quarter now in dispute was in the center of Dr. Dunkley's land. I am satisfied that in 1854 Dunkley entered and paid for this piece of land and received a certificate of the officers at Clinton to that effect.

The question, however, upon which I have had doubts is, whether the plaintiff, who obtained a patent for the land in 1871, was so far affected with notice, or so far put on inquiry, as to authorize the court to hold him responsible for mistakes made by the United States officers. He admits in the conversation reported by Faulk, to whom he applied after his purchase to act as agent for him, that "Dunkley intended to enter it, but made a mistake and entered the 40 east of it." The plaintiff proceeded to give Faulk a history of the way he had become acquainted with the vacancy, that he had been for two years a clerk in the land office at Boonville, and in that way became acquainted with the error, or the fact that Dunkley had not entered it. He then stated that he prosecuted the examination to Washington, and spoke of an assistant he had there, and became satisfied that the land was vacant. In other words, his examination of the records at Boonville and Washington satisfied him that Dunkley was mistaken in supposing he had entered the sw qr. of the se qr., of Sec. 35, that the officers in the land office were not mistaken, but that Dunkley was, and that he had really entered the ne qr. of the sw qr., of Sec. 35. He therefore concluded to follow the decisions of the government officials at Washington,

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but subject of course to any judicial investigation, which might determine that the government officials were wrong and that Dunkley was not mistaken.

The plaintiff purchased with a full knowledge of Dunkley's claim but relying on the records at Washington that such claim would not be available. And if the records at Washington are conclusive and cannot be contradicted by parol evidence, however satisfactory, the plaintiff was not mistaken. It is the necessary result of the conclusion that I have reached, that Dunkley did enter the nw qr. of the se qr., of Sec. 35, in July, 1854, that the officers at Clinton must have erroneously reported to Washington, that Dunkley entered the ne qr. of the se qr. of Sec. 35. In other words, the duplicate sent to Washington was erroneously reported as an entry of the ne qr. of the se qr., and therefore a patent was issued Dunkley in the fall of 1854 for the ne qr. of the se qr., of Sec. 35. But in September, 1854, the records at Clinton showed that the nw qr. of the se qr., of Sec. 35, was entered, and that the ne qr. of the se qr. was vacant, and therefore Mr. Keen was allowed to enter and did enter the ne qr of the se qr., of Sec 35. The plats at Washington showed that the ne qr. of the se qr., of Sec. 35, was entered by Dunkley in July and by Keen in September; that there was a mistake in these plats was obvious. The officers of the government, however, concluded to issue a patent to Dunkley, whose entry was prior in date to Keen's so far as these records showed.

They knew that the United States could not sell the same piece of land twice, and that there was a mistake in the record of the first or second entry. Their conclusion, however material, that the first buyer was entitled to a patent, depended upon a question of fact which they had no authority to determine. As it appears now from evidence entirely satisfactory to me, Dunkley had not entered in July the ne qr. of se qr. of 35, but had entered the nw qr. The plaintiff bought on the assumption that the



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United States officers were right and that Dunkley was wrong. The question as to who was right and who was wrong was one for judicial determination, and the plaintiff made his purchase in view of this, and upon a conclusion he had reached that Dunkley was mistaken, and that the plaintiff could safely rely on the records at Boonville and Washington. Upon the assumption that the officers were mistaken, and that Dunkley was right, the plaintiff could, of course, acquire no title in 1871.

It appears that the land office at Clinton was removed to Warsaw, and that after its removal the office and all its records were destroyed by fire in 1861. This fact would not be material if the officers at Clinton correctly reported, as by law they were required to do monthly, the entries at Clinton. But the testimony shows beyond all doubt that on July 19th, 1854, Dunkley entered the nw qr. of the se qr. of sec. 35, and of course, that the duplicate sent to Washington that he had entered the ne qr. of the se qr., of Sec. 35, was a mistake. The plaintiff, when he purchased in 1871, was apprised that the vacancy in the nw qr. of the se qr. of sec. 35, as it appeared on the books, was a matter in dispute, as the two entries of the ne qr. in July and September clearly indicated. He thought proper to rely on the duplicates sent to Washington. It turns out upon investigation that they must have been false.

My opinion is, therefore, that the judgment of the circuit court was right, and in this opinion Judge Norton concurs.

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THE STATE v. W. H. SMITH, *Appellant*.

**Criminal Law:** NEGLIGENCELY COMPOUNDING A MEDICAL PRESCRIPTION.

An indictment under Sec. 18, p. 447, Wag. Stat., against a druggist for manslaughter in negligently filling a medical prescription with opium, by reason of which the person to whom it was administered died, failed to charge that defendant delivered the medicine to any one to be administered to deceased, or to state what were the ingredients named in the prescription, or the respective quantities of

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the several ingredients, or by whom the medicine was prescribed; *Held*, that these were essential averments, and without them the indictment was defective

*Appeal from Nodaway Circuit Court*—HON. H. S. KELLY,  
Judge.

Defendant, a druggist, was indicted for manslaughter in the fourth degree, in carelessly and negligently filling a prescription. The indictment was as follows:

The grand jurors of the State of Missouri for the body of the county of Nodaway, being duly empaneled and sworn, upon their oaths present: that William H. Smith, late of said county, on or about the 30th day of June, A. D. 1874, at the county of Nodaway, was employed as clerk in a certain drug store in the town of Quitman, in said county, and as such engaged in selling drugs and medicines and in preparing, compounding and filling prescriptions of medicines for the healing and curing of persons sick and diseased, and in the sale and disposition of deadly poisons to such persons as might solicit the same; and that said William H. Smith, as such clerk as aforesaid, then and there had and took upon himself the care, charge, management and control of the drugs, medicines and poisons in such drug store, and of the sale, compounding and disposition of such drugs, medicines and poisons, and that it then and there became and was the duty of said William H. Smith to sell such drugs, medicines and poisons as might be solicited, and to compound and fill prescriptions of medicines for the curing of persons sick and diseased, as might be ordered, directed and required.

And the jurors aforesaid, upon their oaths aforesaid, further present: that said William H. Smith, at the time and place aforesaid, so having the care, charge, management and control of said drug store as aforesaid, a certain quantity, to-wit: thirty grains of powdered opium, a deadly poison, did willfully, feloniously, culpably and negligently put, infuse, mix and mingle in and together with certain

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salutary medicines, then lately before prescribed for one infant male child of the age of fifteen days, then lately born, of the body of Sarah J. Davis, and without name, which said salutary medicines were then and there, being by said William H. Smith made up, mixed and compounded for said infant male child, then lately born of the body of Sarah J. Davis, and without name, to be taken by the said infant male child, then lately born of the body of Sarah J. Davis, and without name, the said William H. Smith then and there well knowing that said powdered opium was a deadly poison.

And the jurors aforesaid, do further present: that the said William H. Smith, the said powdered opium so as aforesaid by him, the said William H. Smith, put, infused, mixed and mingled in and with such salutary medicines as aforesaid, did willfully, feloniously and with culpable negligence, put, mix, mingle and place, in the place and stead of powdered rhubarb, said rhubarb being a curative and healthy medicine, there lately before prescribed, with the said certain salutary medicines aforesaid, for the said infant male child, then lately born of the body of Sarah J. Davis, and without name.

And the said jurors further present: that said infant male child then lately born of the body of Sarah J. Davis, and without name, was then and there a male child of tender years, to-wit: of the age of fifteen days, and that one Sarah J. Davis was then and there the mother and nurse of said infant male child then lately born of the body of Sarah J. Davis, and without name, and as such mother and nurse had the charge and care of said infant male child, then lately born of the body of Sarah J. Davis, and without name, and was then and there required to and did wait upon, nurse and administer to said infant male child, then lately born of the body of Sarah J. Davis, and without name, by giving and administering to said infant male child, then lately born of the body of said Sarah J. Davis,

and without name, food and medicine for the health and cure of said child aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present: that the said Sarah J. Davis not knowing that the said opium, put, infused in and mixed together with said certain salutary medicines as aforesaid, by the said William H. Smith aforesaid, in the place and stead of said curative and healthy medicine aforesaid, to-wit: the said powdered rhubarb aforesaid, then lately before prescribed for said infant male child, then lately born of the body of Sarah J. Davis, and without name, to be taken by the said infant male child, then lately born of the body of Sarah J. Davis, and without name, in the manner aforesaid, to be a deadly poison, but believing the same to be a true and real medicine, then lately before prescribed, to be made up for and taken by said infant male child, then lately born of the body of Sarah J. Davis, and without name, afterward, to-wit: on or about the day aforesaid, and at the place aforesaid, the said powdered opium so as aforesaid, put, infused in and mixed together with such salutary medicines aforesaid, by the said William H. Smith aforesaid, in the place and stead of the said healthy and curative medicine aforesaid, then lately before prescribed for, and to be taken by said infant male child, then lately born of the body of Sarah J. Davis; and without name, did give and administer to said infant male child, then lately born of the body of Sarah J. Davis, and without name, to take and swallow down into his body for the health of and to cure said infant male child, then lately born of the body of Sarah J. Davis, and without name; and, further, that the said infant male child, then lately born of the body of Sarah J. Davis, and without name, not knowing the said powdered opium aforesaid, so in the manner and form aforesaid, put, infused in and mixed together with such salutary medicines aforesaid, by the said William H. Smith aforesaid, in the place and stead of such powdered rhubarb aforesaid, (the said healthy and curative medicine aforesaid,) then lately before

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prescribed, to be made up for and to be taken by the said infant male child, then lately born of the body of Sarah J. Davis, and without name, in the manner and form aforesaid, to be a deadly poison, he the said infant male child, then lately born of the body of Sarah J. Davis, and without name, the said powdered opium, when so given and administered by the said Sarah J. Davis, the said mother and nurse aforesaid, in the manner and form aforesaid, did take and swallow down into his body, by means of which taking and swallowing down into the body of the said infant male child, then lately born of the body of Sarah J. Davis, and without name, of the powdered opium aforesaid, so as aforesaid, by the said William H. Smith, put, infused in and mixed together with said salutary medicine, then lately before prescribed for, and to be taken by said infant male child, then lately born of the body of Sarah J. Davis, and without name, the said infant male child, then lately born of the body of Sarah J. Davis, and without name, then and there became sick and distempered in his body, of which sickness and distemper of body, occasioned by the said taking and swallowing down into the body of the said infant male child, then lately born of the body of Sarah J. Davis, and without name, and of the said powdered opium so as aforesaid, put, infused in and mixed together with said salutary medicine aforesaid, by the said William H. Smith aforesaid, the said infant male child, then lately born of the body of Sarah J. Davis, and without name, on or about the first day of July, 1874, at the place aforesaid, died.

And so the jurors aforesaid, upon their oaths aforesaid, do say: that the said William H. Smith in the manner and form aforesaid, feloniously and willfully, of the culpable negligence of him, the said William H. Smith, the said infant male child, then lately born of the body of Sarah J. Davis, and without name, did poison and kill, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.



*Dawson & Edwards* for appellant.

1. The principal objection to the indictment is, that it nowhere alleges that defendant delivered or administered the powder to the child, or caused it to be done. This was a fact material to be proved, and without the proof of it, no crime could be established against the defendant. The indictment was, therefore, in this respect, fatally defective. *State v. Pugh*, 15 Mo. 510; *State v. Derossett*, 19 Mo. 383; *State v. Holden*, 48 Mo. 93; *State v. Evers*, 49 Mo. 542.

2. The indictment does not set out what the prescription was, or charge that opium was not one of the ingredients mentioned in it. Defendant had a right to be informed with reasonable certainty of the charge against him.

*J. L. Smith*, Attorney-General, and *C. A. Anthony* for the State.

The objection that the indictment does not allege the delivery of the powders, is not well taken. The indictment alleges that Smith "made up, mixed and compounded for said infant male child," the powders, "to be taken by the said child," and that Mary Davis, the mother and nurse of said child, "did give and administer to said child" the powders, not knowing that they contained the poison. In fact, it makes no difference to whom the powders were delivered. The indictment sets forth that the defendant undertook to fill the prescription; that he filled it in such a careless manner that he "infused" opium instead of rhubarb in the powders; that the prescription was filled for the child; the powders were administered to the child and death ensued. Smith's carelessness and negligence lead directly to and result in the death of the child.

PER CURIAM.—If the indictment be analyzed and reduced within a reasonable and readable compass, it will be

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seen that it does not allege that defendant delivered the powders to any one to be administered to the child. It does not appear from the indictment how Sarah J. Davis procured the powders. It is consistent with the allegations in the indictment that Smith, although he compounded the prescription, never delivered it to any one to be administered to the child. It may be inferred from the indictment that defendant delivered the powders to some one, but it is only an inference, not by any means specifically or substantially alleged, and proof that after he prepared the powders he discovered his mistake, and carefully put them away, and some one else got them and delivered them to Mrs. Davis, would not contradict the indictment. It is not alleged that any one asked the defendant to compound the prescription. What were the ingredients named in the prescription, or the respective quantities, or by whom prescribed is not stated. The innocence of the accused is not inconsistent with the averments in the indictment. It is very verbose, containing a great deal which might have been omitted, and many times repeating what it would have been sufficient to state once, but amid all its verbosity and prolixity, we fail to discover essential averments that could have been made in very few words.

Judgment reversed and cause remanded.

REVERSED.

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HUNT V. HOPKINS *et al.*, Appellants.

1. **Pleading:** PETITION ON SPECIAL TAX BILL. A petition on a special tax-bill sufficiently complies with a provision in a city charter that "it shall be sufficient for plaintiff to plead the making and issue of the tax bill sued on, giving the dates and contents thereof," when it contains the substance of the bill; the bill need not be copied in the petition.
2. **Jurisdiction,** AS DETERMINED BY AGGREGATE AMOUNT OF CLAIMS SUED ON. When the jurisdiction of the court depends upon the

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amount in controversy, and the petition contains separate counts upon numerous special tax bills, the aggregate amount of all the bills is the test for determining the question of jurisdiction.

*Appeal from Jackson Special Law and Equity Court*—HON.  
R. E. COWAN, Judge.

*James F. Mister* for appellant.

1. The tax bill is no part of the petition, and the court in determining the sufficiency of the petition, must look alone to the petition. It should purport to give the contents of the tax-bill, but this it does not do. Sess. Acts of 1872, Sec. 25, pp. 408, 413.

2. Circuit courts have no original jurisdiction to try cases cognizable before justices of the peace; except where provision is made for concurrent jurisdiction. *Stamps v. Bridwell*, 57 Mo. 22; *Dillard v. St. L. K. C. & N. R. R. Co.*, 58 Mo. 69. Justices of the peace and the city recorder have jurisdiction where suit is brought on a tax-bill not exceeding three hundred dollars. Sess. Acts of 1872, pp. 410, 411. There is no provision in the charter giving circuit courts concurrent jurisdiction. By the general law concurrent jurisdiction is given to circuit courts and justices of the peace in cases of contract, where the amount exceeds fifty dollars, but not in cases below that sum. Wag. Stat., 1870, Sec. 2, p. 431. But tax-bills are not contracts. *City of Camden v. Allen*, 2 Dutch. (N. J.), 398; *Pierce v. Boston*, 3. Met. 520; *Lane County v. Oregon*, 7 Wallace 80; 1 Black. Com., p. 475; Parsons on Cont., Vol. 1 p. 7. The charter provides that the judgment on each tax-bill shall be special. Sess. Acts 1872, Sec. 25, p. 408 to 413.

*William E. Sheffield* for respondent.

1. The petition alleges the performance of every act required of the city engineer in order to make the tax-bill and allegations of every statement, and more than the tax-

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bill is required to contain. *City of St. Louis v. Coons*, 37 Mo. 44.

2. Even if it be held that the charter, giving jurisdiction to justices of the peace and the city recorder in cases where the tax-bills do not exceed \$300.00, takes away the jurisdiction of the circuit court in such a case; yet, as the charter also authorizes the joining of any number of tax-bills in one suit where they are against different lots owned by the same persons, the objection on the ground of jurisdiction in the case at bar is not valid. Sess. Acts of 1874, p. 323. This court has decided that the aggregate amount in all the counts determines the question of jurisdiction. (Citing cases referred to by the court).

NORTON, J.—This suit was instituted in the special law and equity court of Jackson county, and is founded on forty-two separate tax-bills. The petition contains forty-two separate counts, forty of them based on tax-bills under the sum of \$50, one on a tax-bill for \$54, and one on a tax-bill for \$173.84, the whole aggregating the sum of about \$1,500.

Upon the trial plaintiff offered in evidence the various tax-bills on which the various counts of the petition were founded, to which defendants objected, on the grounds that the petition did not state a cause of action, and that the court had no jurisdiction to try the case. The objections were overruled, the evidence admitted, and judgment rendered for plaintiff, from which defendants, after making an ineffectual motion for a new trial, have appealed to this court, and urge as a reason for the reversal of the judgment the action of the court in overruling their objections to the admission of the tax-bills in evidence. As the objections go to the sufficiency of the petition, we copy the first count, the remainder of them being in all respects like it, except as to the amounts claimed to be due. It is as follows: "Plaintiff states that, on the 20th day of June, 1873, the tax-bill hereto annexed, marked 1, was duly

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made and issued by the engineer of the City of Kansas, to one Nathaniel Grant, who was the contractor with the said city for grading Campbell street from the outer line of Eighth street to the south line of Independence avenue, exclusive of grading sidewalks thereon, and after the completion of said contract; that said grading was done by virtue of an ordinance of said city, entitled an ordinance to grade a part of Campbell street, approved November 21st, 1872, and was to be paid for in tax-bills; that after the completion of said work, said engineer computed the cost of the same, and apportioned it among the several lots or parcels of land charged therewith, according to the assessed value thereof, said assessment having been made according to law by the assessor of said city; that the said tax-bill is against, and a lien on and upon the following real estate in Jackson county, Missouri, to-wit: Lot number nine, in block two, of Ransom & Hopkins' addition to the City of Kansas, in Kaw township, and which is owned and claimed by defendants, and is within the limits of the property liable to be assessed for said work, and is chargeable for the said grading; that said land has been and is charged by said tax-bill with \$39.25, the proper share of said cost; that the work completed, consisted of 11,197 cubic yards of earthwork and furnishing materials therefor, making a total cost of \$2,631.32, and the above described property is charged as aforesaid with  $\frac{250}{16786}$  parts of said total cost; that the said tax-bill bears fifteen per cent. interest from date of issue if not paid in thirty days after issue; that the said tax-bill is wholly due, and was duly assigned by said Grant on the 15th day of June, 1874, to plaintiff, who is the owner thereof, and is unpaid. Wherefore plaintiff demands special judgment for the same so due, and interest, to be enforced according to law."

The defendant, on the trial, objected to the introduction of the tax-bills in evidence on the ground that the petition did not state a cause of action in this, that it did not recite nor allege the contents of the tax-bills, and on the



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further ground that forty of the counts being founded on tax-bills less than \$50 each, the court had no jurisdiction to try the case

We can perceive no error in the action of the court in overruling the objection, and receiving the tax-bills in evidence. It is provided in the Session Acts of 1872, Sec. 25, p. 408, that such tax-bills "in any action thereon, shall be received as *prima facie* evidence of the validity of the bill, of the doing of the work, of the furnishing of the materials, and the liability of the property to the charge stated in the bill." It further provides that it "shall be sufficient for plaintiff to plead the making and the issue of the tax-bill sued on, giving the dates and contents thereof, and assignment thereof, in case of assignment." Under this provision of the amended charter, it is not necessary for the pleader to copy the tax-bill in his petition, it is only necessary that the substance of it should be stated. The petition in this case, we think sufficiently complies with the provision of the charter above quoted. The date and amount of the bill, together with the description of the lot against which it is a charge, together with the circumstances out of which they grew, are all set out with particularity. The contents of each tax-bill is stated in such manner as to notify defendant beyond question of the purpose of the suit, quite as much so as if the bill had been copied in the petition *in haec verba*.

We think that the case of *Smith et al. v. Clark County*, 54 Mo. 58, is conclusive of the question of jurisdiction raised by defendant. In that case the petition contained seven counts, each count was founded on a coupon for \$35, which was a sum below the jurisdiction of the circuit court, and it was held that the jurisdiction of the court was determined by the aggregate amount claimed in the petition. So in the case of *Fickle v. St. Louis, Kansas City & Northern R. R. Co.*, 54 Mo. 225, it was held that when the aggregate amount claimed in a petition brought the cause within the

1. PLEADING: petition on special tax bill.

2. JURISDICTION, as determined by aggregate amount of claims sued on.



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jurisdiction of the court it was sufficient to confer jurisdiction. Although in the case at bar forty of the counts are based on tax-bills each for less than \$50, yet as the aggregate amount claimed in the petition is \$1,500, the trial court under the principle of the cases above cited, had jurisdiction to try and determine the case. Judgment affirmed, in which the other judges concur.

AFFIRMED.

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McPHERSON *et al.* v. THE ATLANTIC AND PACIFIC RAILROAD Co., *Garnishee of the Osage Valley & Southern Kansas Railroad Co., Appellant.*

1. **Extent of Garnishee's Liability.** Process of garnishment can not be made to operate so as to annul the contracts of parties, or to subject a party to recovery by the creditor of his creditor, when the latter could not himself recover.
2. **Landlord and Tenant: CONTRACT: TAXES.** Where by the terms of a lease the lessee was entitled, from time to time, to deduct from the rental all taxes imposed upon the leased property, which the lessee either had paid or might be liable to pay, and there was at the time no law imposing a personal liability for taxes on any one, but any taxes levied upon the property were a lien upon it; *Held*, that the stipulation amounted to an appropriation of a reserved fund out of the rental to the payment of the taxes.

*Appeal from Cooper Circuit Court.*—HON. T. M. RICE, Judge.

Plaintiffs recovered judgments against the defendant, the Osage Valley & Southern Kansas Railroad Company, for the aggregate sum of \$8,384. Executions were issued and the Atlantic & Pacific Railroad Company was garnished as debtor to the defendant.

The cases were afterward consolidated and tried as one case. It appeared by the pleadings and proofs that the Osage Valley & Southern Kansas Railroad Company had, in 1867, leased its unfinished road to the Pacific Railroad, which had finished it and afterward assigned its interest

in the lease to the garnishee. By the lease, the lessee was to pay quarterly, as rental, thirty-five per cent of the gross earnings, "provided that before such thirty-five per cent. of the said gross receipts is paid over, there shall be deducted therefrom all taxes now or at any time hereafter imposed under authority of either the United States, State, city or county laws, upon the whole or any part of said demised road, its buildings or appurtenances, and a pro rata share of any tax imposed by the United States upon the gross receipts therefrom, which taxes the said party of the second part have either paid or may be liable to pay." The lease also contained an agreement on the part of the lessor to fence the road at its own cost, and a stipulation that the lessor should not be held accountable for any damages to third parties by reason of the road being unfenced, provided the fence should be built within a certain time. It also undertook to convey to the lessee, with warranty of title, a certain lot in the city of Boonville.

Under this lease rent had become due to the amount of \$9,637, but the garnishee claimed the right to retain this amount in order to pay taxes, which had been assessed against the road to the amount of twelve thousand dollars and upwards, and to indemnify itself against loss by reason of the failure of the lessor to keep the stipulation about fencing, and by reason of failure of the title to the Boonville lot, and to re-imburse itself for several sums of money paid to other creditors of the defendant, under earlier garnishments. Upon the trial it appeared that the garnishee had fenced a small part of the road at its own cost, and evidence was offered to show that it had contracted for the fencing of another part, and intended to complete the whole as fast as it conveniently could. It also appeared that one Ells had brought an action of ejectment for the lot, and had recovered a judgment for \$1,400 damages and costs, which had been paid by the garnishee. It also appeared that the garnishee had been previously garnished as debtor of the defendant in several cases,

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and had been obliged to pay \$1,840 in satisfaction of judgments in those cases; that in consequence of the road being unfenced, the garnishee had been compelled to pay to various persons whose stock had gotten upon the road and been killed \$2,194; that the taxes, though assessed, had not been paid by the garnishee, and that defendant was insolvent. The court allowed the garnishee credits to the amount of \$4,841 for the cost of the fences actually built, and the sums actually paid out as damages and costs in the Ells case, and under the prior garnishments, but refused to allow the items of taxes, damages paid for stock, and fences which the garnishee intended to build, but had not built, and gave judgment for the plaintiff for \$4,796. The garnishee appealed.

During the progress of the case, a paper was filed by the representative of the holders of certain bonds, setting forth that they were secured by a mortgage on the road and property of the defendant company, given by defendant after the execution of the lease to the Pacific Railroad, and claiming that by virtue of this mortgage the bondholders were entitled to have the rental in the hands of the garnishee applied to the payment of their past-due coupons for interest; and the garnishee prayed that the court might adjudicate the claim of the bondholders. Plaintiffs denied the validity of this mortgage on the ground that the stockholders of the defendant company had never authorized its execution, and denied that the bondholders had any right to the rental.

*John Montgomery, Jr.* for appellant.

1. The liability of the garnishee to the creditor must, of course, be determined by the extent of its liability to the principal defendant; and whatever defense it could successfully make to the demand of the principal debtor to recover the sums of money in its possession, it may safely plead in the garnishment proceeding. The contract cannot be affected by the garnishment proceeding, or the

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rights of the garnishee disturbed by it. *Firebaugh v. Stone*, 36 Mo. 114.

In the construction of the contract it is material to consider the evident intent of the contracting parties, to be gathered from the whole instrument. It seems to have been understood by both parties that taxes had then or would be assessed upon the demised property, and that the lessee would be called upon to pay them or be rendered liable therefor, and express reservation is made by the provision allowing the amount of these taxes to be deducted from the rental. In leasing this property the lessor could not have supposed that thereby the lessee became in law personally liable for the payment of the taxes which were then due, or which would thereafter be levied. There was no reason for such a presumption, but the fact was well known to both parties, and must be presumed to have been in view when the stipulation was made, that when the taxes were levied upon the demised property they constituted a lien upon it, and unless they were paid the lien thereon would be enforced and the lessee be compelled to pay them, to preserve its leasehold interest. It would become liable to pay these taxes in that event, if it would preserve the leased property. Of course these taxes could not, under the law as it then stood, be assessed as a personal liability or obligation of the lessee, but if to save the leased premises from sale and consequent eviction therefrom the lessee should pay the taxes, it cannot be doubted but that, without any express agreement in the lease, he could withhold it from the rent or maintain assumpsit to recover it from the lessor. *Wells v. Porter*, 7 Wend. 120; *Smith's Landlord and Tenant*, side page 129, note 12.

But in this case there is a special contract that the lessee shall deduct from the rental all taxes levied, or to be levied upon the leased property. Such a contract is unquestionably good, and many cases might be cited showing that similar contracts have been held binding and the garnishee entitled to his discharge, even though at the time



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of the trial the liability was still undetermined and contingent. *St. Louis v. Regenfuss*, 28 Wis. 144; *Thompson v. Fischesser*, 45 Ga. 369; *Wheelock v. Tuttle*, 10 Cush. 123; *Shearer v. Handy*, 22 Pick. 417.

It is admitted that the taxes were not actually paid, but under the lease the lessee had a right to retain a sufficient sum to meet them. The evident intention of the parties was that the lessee should either pay them or retain sufficient of the rental to meet them.

2. The court erred in refusing to allow the appellant to retain sufficient of the funds shown to be in its hands to pay the cost and expenses of the construction of the fences, as stipulated in the lease between it and the Osage Valley & Southern Kansas Railroad Company. Upon an action by the lessor to recover the rental, the lessee would have a perfect right to plead the failure of the lessor to comply with the covenants in the lease, and set up his damages occasioned thereby as a set off, the lessor being insolvent. *Reppy v. Reppy*, 46 Mo. 572; *Davis v. Milburn*, 3 Iowa 163; *Lindsey v. Jackson*, 2 Paige Ch. 581.

3. The court erred in refusing to deduct from the sum of money found to be in the hands of the garnishee, the sum paid by it for stock killed by reason of the failure of the original defendant to fence the railroad as it covenanted and agreed to do.

4. The creditor cannot, by the process of garnishment, force the garnishee into any worse condition than it would be in if sued by the defendant, and such a demand on the part of the defendant could not be sustained. If the defendant were to institute an action to recover the very money here allowed the creditor by the court below, and after the institution of the suit the garnishee were to expend the sum in erecting the fences, or in paying the taxes, no court would hesitate about allowing the garnishee credit for the sums so expended; but the creditor by this process seeks to tie up the fund in the hands of the garnishee and compel it to hold it to satisfy the demands

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he has against the original defendant. The garnishee answers in this action that it was proceeding to expend the money reserved for that purpose from the rental, in building the fences authorized by the lease, and had already expended eight hundred dollars of the sum, and would expend the whole as fast as it could arrange therefor. If this is not a complete answer, and if the creditor is to be allowed to take this fund, the garnishee and lessee is deprived of the benefit of the covenants in the lease which his foresight had so carefully provided, and must be left for its damages to an action against a worthless and insolvent lessor. The creditor is allowed to place the garnishee in a worse condition than it would be possible for the original defendant to do. If the sum in the hands of the garnishee is no more than would be necessary to complete the covenants in the lease, it is not liable to be garnished therefor. *Wheelock v. Tuttle*, 10 Cush. 123; *Robinson v. Hall*, 3 Metc. 301. The evidence in the court below presented this state of fact, or would, had it been admitted. The action of the court in excluding this testimony and refusing to allow the garnishee the credits, was clearly erroneous.

*John Cosgrove with Ewing, Smith & Pope* for respondent.

1. The appellant was not entitled to credit for taxes then assessed against the defendant in the execution. There was no law making the lessee or its assignee liable for the taxes at the time the judgment was rendered. This occurred before the act of March 29th, 1875, which would have had that effect.

2. The allegation in the answer, that the appellant "intended to fence the remainder of the road" of defendant in execution, should have been stricken out, and the court in disregarding it in determining the amount of money in appellant's possession, did not commit error. The appellant was credited with all money paid out by it, and for all money it was liable for up to the time of the trial.

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3. The money garnished was due under the lease, and was subject to the payment of plaintiffs' judgments. Hilliard on Mortgages 210, §§ 35, 36; 1 Smith's Lead. Cas. (5 Am. Ed.) top pp. 667, 668, 692; 1 Washburn Real Prop. 130; 4 Kent Com. (12 Ed.) 165. It was a mere chose in action, and was subject to garnishment like any other property. *Gilmore v. Ills. & Miss. Tel. Co.*, 91 U. S. 603.

HENRY, J.—Whether the Osage Valley and Southern Kansas Railroad Company had capacity to execute the mortgage in question, and if it had, whether, under the mortgage, the mortgagee was entitled to the rents due from the Atlantic and Pacific Railroad Company, or which accrued after its execution, are questions which it is not necessary to determine in this cause, and would, therefore, be more appropriately decided in a suit between the mortgagee and the latter company. If the mortgage gave the mortgagee a right to the rents, the plaintiffs were not entitled to the judgment they obtained. If it did not, then the question arises, was the Atlantic and Pacific Railroad Company entitled, under the lease, to retain, against the plaintiffs, an amount of money equal to the taxes assessed against the road? If so, the judgment must be reversed, because the court below ruled otherwise. It was an express stipulation in the lease, that the lessee should reserve of the rent an amount equal to the taxes assessed, or to be assessed against the property leased. It was of the nature of a contract of indemnity.

The lessee did not expressly agree to pay the taxes, but was liable to lose its interest in the road by a sale, if the taxes were not paid. The taxes then levied were, and those to be levied would be, a lien upon the road, and while the lessee did not expressly agree to pay them, the stipulation, was substantially an appropriation by the parties, of the reserved fund to the payment of that indebtedness, and the lessor, (or the mortgagee, if the mortgage be a

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valid mortgage,) could, by a proper proceeding, compel the lessee so to apply the money.

But could the lessor have compelled the lessee to pay to it the amounts so reserved, without first paying the taxes? We apprehend not, and if not, it follows that its judgment creditors could, in a garnishment proceeding, recover against the lessee only what remained of the indebtedness in excess of the amount reserved. It is alleged in the answer of the garnishee, and not denied by plaintiffs, and therefore admitted, that the Osage Valley and Southern Kansas Railroad Company is insolvent, and that the taxes which, at the date of the garnishment, had been assessed against the property, amounted to about \$12,000. If compelled to pay the whole amount of the rents to creditors of the lessor, the defendant must also either pay the taxes or lose its interest in the property by the sale of the same for the taxes. This would virtually annul the contract of the parties, and subject the defendant to a heavy loss, against which it had provided by that stipulation in the lease. The parties were competent to make that contract, and, as nothing is alleged against its validity, the court cannot annul or disregard it, or in any manner abridge defendant's rights under it. We are not without authorities to sustain these views. In the case of *St. Louis et al. v. Regenfuss*, 28 Wis. 145, it was held that "the garnishee is liable to the creditor to the same extent that he was liable to the defendant in the attachment suit before service of garnishee process. This is the limit of his liability." The facts of the case were that the garnishee had purchased of the debtor a tract of land for \$1,200, of which he paid \$950, and for the balance signed a note with the debtor as his surety, and that amount was retained of the purchase money. That note had not been paid by the garnishee, and yet the court held that the plaintiff was not entitled to a judgment against him for \$250, or any other sum.

In *Firebaugh v. Stone*, Garnishee, 36 Mo. 114, the court

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approved the doctrine laid down by Drake in his work on attachment, that "an attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee, and he can acquire no rights against the latter, except such as the defendant had, and he is not permitted to place the garnishee in any worse condition than he would occupy if sued by the defendant, and it follows necessarily that whatever defense the the garnishee could urge against an action by the defendant for the debt, in respect of which he is garnished, he may set up in bar of a judgment against him as garnishee."

In *Scales et al. v. The Southern Hotel Co.*, 37 Mo. 524, the court observes that "in order that an indebtedness may be liable to garnishment, it must be shown to be absolutely due as a money demand, unaffected by liens or prior incumbrances, or conditions of contract." As the taxes, together with the amounts properly allowed by the court to the garnishee, exceeded in amount the arrears of rent, it is unnecessary to pass upon the other matters of set-off and recoupment, relied upon by defendant.

All concurring, the judgment is reversed, and cause remanded.

REVERSED.

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SIMS V. FIELD, *Appellant*.

**Deed of Trust, POWERS OF GRANTOR IN.** One who gives a deed of trust upon land cannot afterwards make any agreement concerning the same to the prejudice of the title conveyed by the deed. A subsequent contract with a stranger permitting him to inclose and use part of the land, is void as against a purchaser at a sale under the deed of trust.

*Appeal from Audrain Circuit Court.*—HON. G. PORTER, Judge.



*E. M. Crozier* for appellant.

*John M. Gordon* for respondent.

NORTON, J.—This was a suit instituted in the circuit court of Audrain county to recover damages growing out of the alleged removal of a division fence between the lands of plaintiff and defendant. The answer denies the allegation of the petition as to the existence of any such fence, and also that plaintiff sustained any damage by reason of the removal of the same.

The case was tried by the court without the intervention of a jury, and judgment for one hundred dollars was rendered for plaintiff, from which defendant has appealed. The principal ground relied upon for a reversal of the judgment was the action of the court in refusing four instructions asked by defendant, two of which are as follows:

No. 1. No agreement made by Vanhorn with Leeper constituting a part of the fence on the lands conveyed by the deed of trust of Evans and Vanhorn to James Ferguson, a partition fence, could bind the said Ferguson, or a purchaser, under said deed of trust.

No. 2. After Evans and Vanhorn conveyed the land to Ferguson, on which the fence alleged to have been broken is situate, no agreement of said Vanhorn in regard to the title or use of said fence could in any way affect the right of defendant to remove said fence.

The evidence adduced on the trial tended to show that in 1871, one Leeper owned a tract of land adjoining a tract occupied by one Vanhorn and Evans; that on the land of Vanhorn and Evans, about sixty feet from the line dividing the land occupied by them, there was a string of fence about one-quarter of a mile in length; that Vanhorn agreed that if Leeper would build a fence upon his own land parallel to the line dividing their lands, he might join to the fence of Vanhorn and Evans; that in 1867 Vanhorn and Evans conveyed to one Ferguson, by deed of trust,

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the land upon which the fence alleged to have been broken and carried away was situate; that in 1872, the land was sold under said deed of trust, and defendant Field became the purchaser, and took possession of the same under his purchase in the following December, and without knowledge or notice of the agreement between Leeper and Vanhorn, whereby Leeper was permitted to join his fence to the fence of Vanhorn, removed the fence on the land so bought in March, 1873; that, in consequence of such removal, stock trespassed on the land of plaintiff, tramping his plowed ground and injuring his orchard; that Leeper sold and conveyed his land to plaintiff in 1873, who entered into possession of the same about the time the fence was removed by defendant.

In the light of the above facts, we think the court erred in refusing to give the declarations of law asked for in the two instructions above copied. It was not competent for Vanhorn, after he had parted with his title to the land on which the fence was situated, to make an agreement in regard thereto, which would bind either Ferguson, the trustee, or the purchaser under the deed of trust. The purchaser, under the said deed, acquired all the rights which Vanhorn and Evans had at the time the deed was executed. Vanhorn and Evans, after the conveyance by them to Ferguson, could not by their agreement give to another an interest in a fence situated on the land conveyed, any more than they could give an interest in the dwelling located thereon, in prejudice of the estate conveyed. Nor could they give to another, by agreement to the prejudice of a purchaser under the deed of trust, the use of sixty feet in breadth of the land conveyed, and one-fourth of a mile in length. Such would be the effect of the agreement between Leeper and Vanhorn, should their act be construed as binding on the defendant in this case, who purchased under the trust deed made to Ferguson.

Judgment reversed; the other judges concurring.

REVERSED.

PECK *et al.* v. RITCHEY, *Appellant.*

1. **Principal and Agent:** EVIDENCE: DECLARATIONS OF AGENT. Declarations of a person assuming to act as agent of another, are not admissible in evidence to prove his agency, but, after a *prima facie* case of agency is proven against the principal, declarations made by the agent in the prosecution of and relative to the business contemplated by such agency, are admissible against the principal; declarations, however, made to third parties, by the person alleged to be an agent, tending to disprove the fact of such agency, are not admissible in favor of the person alleged to be his principal.
2. ———: ———: CONTRADICTIONARY STATEMENTS OF WITNESS. Evidence of contradictory statements made by a witness in regard to his agency, is admissible to show the character of the witness, and to enable the jury to determine the credit to which he is entitled; and a witness cannot, either by his feigned or real forgetfulness of having made such contradictory statement, deprive a party of the right to such evidence; nothing but an admission by the witness that he made the very statement alleged will deprive the party of the right to prove it.
3. **Consignment:** NOT NOTICE TO CONSIGNEE THAT HE IS REGARDED AS PURCHASER. The fact of a consignment of goods is not of itself notice to the consignee that he is held by the consignor as the purchaser of the goods sent.
4. **Principal and Agent:** WITHIN WHAT TIME REPUDIATION OF UNAUTHORIZED ACTS OF AGENT MUST BE MADE. An instruction that the principal, wishing to repudiate the unauthorized acts of one assuming to act as his agent, should do so upon learning the fact, or, certainly, within a few days, was held to be erroneous, and that the words "within a reasonable time," or "as soon thereafter as he can," or equivalent words, should have been substituted for "within a few days."
5. **An Instruction is Erroneous** which assumes as a fact that which is in issue, and which the jury are required to pass upon.
6. **Witness:** THE CREDIT TO BE GIVEN TO HIM. A witness is not to be disbelieved solely because he made statements out of court inconsistent with his testimony, nor is the converse of this proposition true; the jury are to determine the credibility of the witness from all the facts and circumstances in evidence.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

This was a suit for the price of building materials

alleged to have been sold, shipped and delivered by plaintiffs to defendant.

The 5th, 6th, 10th, 12th and 14th instructions given by the circuit court, at the instance of plaintiffs, and which this court, in the opinion, declares should have been refused, are as follows :

5. The court instructs the jury that where goods are shipped to a person, in his name and to his address, when he is informed or learns that such goods or property is there for him and subject to his order, if he did not order the same or authorize any one to order the same for him, it is his duty to refuse to receive or accept the same, or to immediately notify the shipper or consignor of the same, that he did not order said goods or authorize any one to do so for him. And if he fails to do so, and receives the goods, it is too late for him, in a month or so after, when payment of the same is demanded, to deny that he authorized any one to order the same for him, or that he purchased the same himself, but he is bound to pay the owner of such material, who shipped the same to him in good faith, supposing that he had ordered the same, or authorized the same to be ordered.

6. That even though the acts of Barton, in acting as agent for defendant were unauthorized, yet, defendant cannot approve of a part of such alleged unauthorized acts of Barton and disapprove of another part; but, if he approved of a part of such alleged unauthorized acts of Barton, he thereby approves of all of his said unauthorized acts in relation to the same matter, and is as much liable for the same as if he gave Barton express authority to do the same.

10. The court instructs the jury that, where the principal wishes to repudiate the unauthorized acts of one who assumed to act as his agent, it is his duty to do so upon learning the fact, or certainly within a few days, or, if he does not, his silence amounts to a ratification, no matter what may have been his intention on the subject.

12. That although the material may have been shipped or addressed to J. M., or T. M., or F. M. Ritchey, yet defendant, by receiving the same, admits that the same were intended for him, and is estopped from denying that such material as was marked T. M. Ritchey, or F. M. Ritchey, or both, was not intended for him or shipped to him.

14. The court instructs the jury that a witness is not to be disbelieved, alone, because he made statements out of court inconsistent with the facts testified to in court when under oath.

The following is the third instruction referred to by the court:

The court instructs the jury, that if they believe from the evidence, that the defendant accepted any part of the materials sued for, with knowledge of the fact that they had been furnished by plaintiffs on defendant's account, he will be held to have ratified the purchase as to the whole, and is liable for the same.

C. W. Thrasher and H. C. Young for appellant.

1. Barton's own declarations could not make him the agent of appellant. *Robinson v. Walton*, 58 Mo. 385; *Sumner v. Saunders*, 51 Mo. 89; *Franklin v. Globe Mutual Life Ins. Co.*, 52 Mo. 461.

2. If his statements concerning the house he was building for appellant, were competent evidence to prove that he was acting as agent for appellant, it would seem that other statements made, at the same time, about the same matter, might also well be used as evidence to prove that he was not acting as such agent.

3. The fifth instruction given for respondents is a mere abstract declaration of law, and has no application to this case, and the jury are not directed how to apply it to this case, or what facts they must find in order to be governed by it. *Clarke v. Kitchen*, 52 Mo. 316; *Washington Mut. Fire*



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*Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Royer v. Fleming*, 58 Mo. 438.

4. The sixth instruction, in effect, assumes a fact to exist, and directs the jury what verdict they are to find, without regard to the evidence. *Bowling v. Hax*, 55 Mo. 446; *Glenn v. Lehnen*, 54 Mo. 45; *State v. Stonum*, 62 Mo. 596; *Gist v. Loring*, 60 Mo. 487; *Lester v. K. C., St. Joe. & C. B. R. R. Co.*, 60 Mo. 265.

5. The tenth instruction is erroneous. Whether, or not, there has been an implied ratification by a principal of unauthorized acts of an assumed agent, can only be determined by the peculiar circumstances of each case, and there is no inflexible rule that "a few day's silence," however much that may be, amounts to a ratification of any particular acts of such assumed agent; such ratification can only be determined by the jury upon all the facts and circumstances of the transaction. *Glenn v. Lehnen*, 54 Mo. 45; *Gilchrist v. Donnell*, 53 Mo. 591; *Porter v. Harrison*, 52 Mo. 524.

6. The twelfth instruction assumes that appellant received the materials sued for, and was thereby estopped from denying that it was intended for and shipped to him; it leaves nothing for the jury to find. *Farrar v. David*, 33 Mo. 482; *Capital Bank v. Armstrong*, 62 Mo. 59; *Iron Mt. Bank v. Murdock*, 62 Mo. 70; *Bowling v. Hax*, 55 Mo. 446; *Chouquette v. Barada*, 28 Mo. 491; *Merritt v. Given*, 34 Mo. 98; *Turner v. Loler*, 34 Mo. 461; *Moffatt v. Conklin*, 35 Mo. 453; *Sawyer v. Han. & St. Jo. R. R. Co.*, 37 Mo. 240.

7. The fourteenth instruction is in direct conflict with the well settled rule of law, that the jury are the sole judges of the credibility of witnesses. *Wannell v. Kem*, 57 Mo. 478; *Henschen v. O'Bannon*, 56 Mo. 289; *Durkee v. Chambers*, 57 Mo. 575.

*John O'Day* for respondent.

1. If the silence of the principal is either contrary to his duty, or has a tendency to mislead the other side, such

silence is conclusive evidence of ratification, and more particularly is such the case among merchants, where notice of the act done is given by letter which is not answered in a reasonable time. *Greenleaf's Ev.*, (9th Ed.) Secs. 66 & 67; *Cairnes v. Bleeker*, 12 Johns. 304; *Story on Agency*, (6th Ed.) Sec. 258; *Watson v. Gray*, 4 Keyes 385; *Parson's Contracts*, (4th Ed.) p. 46; *Benedict v. Smith*, 10 Paige 128; 2 Kent's Com., p. 615; *Johnson v. Jones*, 4 Barb. 369; 3 Phillips' *Ev.*, (4th Ed.) pp. 402 & 403, note.

2. The acts of the principal are to be construed liberally in favor of the adoption of the acts of the agent. *Godwise v. Hacker*, 1 Caines Rep. 526; *Benedict v. Smith*, 10 Paige Rep. 128.

3. Ratification arises often by implication. It is not necessary that there should be any positive or direct confirmation—small matters, slight circumstances, will sometimes suffice to raise a presumption of ratification. *Story on Agency*, Secs. 252 & 253.

HENRY, J.—The defendant was liable in this action, if at all, upon the ground that James S. Barton was his agent in the purchase of the materials, or, else, that having been purchased for him by Barton, without any authority previously given by defendant, the defendant subsequently ratified the act.

That the declarations of a person, who assumed to act as agent of another, are not admissible to establish the agency is well settled; but it is equally well settled, that after the party alleging the agency has made a *prima facie* case of agency against the principal, any declarations made by the agent in the prosecution of, and relative to the business contemplated by such agency, are admissible against the principal. Barton, the first witness introduced by plaintiffs, testified that he purchased for defendant the materials in question, and that he was ordered to do so by the defendant. This was a sufficient foundation for the admission

1. PRINCIPAL AND  
AGENT: evidence:  
declarations of  
agent

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of Barton's letters to the plaintiffs in regard to the materials.

Respondent contends, that if Barton's declarations, that he was the agent, are to be received against him, then any declarations to the contrary made by him are admissible against the appellant. This does not follow. His declarations are only received against the principal, because of the relation between them. Until this is established, they are not admissible against the principal, and when admitted, they are as the declarations of the principal himself. *Qui facit per alium facit per se.*

As a witness, he testified to the agency, and if he had made contradictory statements in regard to his agency, it was legitimate to impeach him in the ordinary mode, but what he may have said to third persons, as to his agency, could not be received against plaintiffs as evidence of the truth of such statements, but only to show the character of the witness, and to enable the jury to determine what credit he was entitled to as such. The 13th instruction given by the court for plaintiffs, was therefore a correct declaration of the law, and the court properly excluded evidence of statements made by Barton, tending to show that he was not defendant's agent, except those as to which he was interrogated and denied making.

Barton was asked, on cross-examination, if he did not state to J. W. Lamson, naming time and place, that he had made a contract with Ritchey to erect for the latter, a dwelling house at Ritchey, Mo., for \$4,200.00. His answer was that he did not know whether he had or not. Lamson was introduced as a witness by defendant, and asked if Barton had not, to him, made that statement, at the time and place designated, but the court refused to permit witness to answer the question, because Barton had not denied that he made the statement. In this the court erred.

A witness cannot avoid contradiction by equivocating,

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nor is the opposite party to be deprived of the right to show that the witness has made contradictory statements, either by his feigned or real forgetfulness. Nothing but an admission that he made the very statement alleged, will deprive the opposite party of the right to prove it. Starkie on Evidence, (9th Ed.,) 241. The question put to Barton was relevant. The remark imputed to him was that he had contracted with Ritchey to build the house for which these materials were procured, for \$4,200; and if this were so, he was bound by the contract to furnish the materials, which he testified he had purchased for Ritchey. The 5th, 6th, 10th, 12th and 14th instructions given by the court, at the instance of plaintiffs, should have been refused.

The 5th is defective in declaring a consignee liable, if he know that goods are shipped in his name and are subject to his order, unless he immediately notify the consignor that he refuses to accept them.

3. CONSIGNMENT:  
not notice to consignee that he is regarded as purchaser.

This requires a qualification that they were bought for him by some one who was not authorized to make the purchase, and that the consignee was aware of the facts. The purchaser, for his convenience, might have ordered their consignment to the consignee; the simple fact of consignment of goods to the consignee, is by no means notice to him that the consignor holds him, as a purchaser of the goods, for their price.

The 6th instruction was wholly unnecessary, and the principle it was intended to declare, was much better stated in the 3d instruction.

In the 10th, the words "within a reasonable time," or "as soon thereafter as he can," or equivalent words should

4. PRINCIPAL AND AGENT: within what time repudiation of unauthorized acts of agents must be made.

have been substituted for "within a few days." Each case is governed by its own peculiar circumstances. Under some circumstances the act of the agent would bind the principal, if he did not immediately repudiate it, while other cases may be supposed where his silence for a week would not have that effect.

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The 12th is erroneous in this, that it assumes that Ritchey received the goods. That was an issue for the jury to pass upon, and the court in its instructions, should not have assumed the fact to be one way or the other.

The 14th instruction should have been refused. It is not a principle of law that a witness is not to be disbelieved solely because he made statements out of the court inconsistent with his testimony, nor is the converse of the proposition true. The jury are to determine the credibility of the witness from all the facts and circumstances in evidence. Some confidence must be reposed in their intelligence and integrity. Why a witness should, or should not, be believed, the ordinary juror is capable of deciding. There are no artificial rules which will conduct him unerringly, but his common sense and experience will enable him, if he is unbiased to place a proper estimate upon the testimony of witnesses. These are much safer guides than any arbitrary rules that could be prescribed. The court determines the competency, and when it has told the jury that they are the sole judges of the credibility of witnesses, and, to this end should consider all the facts and circumstances which bear upon their credibility, it has fully discharged its duty in that respect. There is no man of common intelligence, but knows what relations and circumstances are most likely to bias a witness, and, although frequently given, and too often approved by courts of last resort to be condemned, yet it needs no instruction from the court to tell the jury that a father or a son is under temptation to color his testimony to secure to the other success in any controversy he may engage in.

With the concurrence of the other judges, except SHERWOOD, C. J., not sitting, the judgment is reversed and the cause remanded.

REVERSED.



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Bray v. Marshall.

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BRAY V. MARSHALL, *Appellant.*

**Ejectment, PRACTICE IN: CHANGE OF VENUE: JURISDICTION.** Unless an ejectment case is transferred by a proper order entered of record from the court of the county in which the land lies, no court in any other county can acquire jurisdiction of it; and the question of jurisdiction may be raised for the first time in the Supreme Court.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER, Judge.

*John P. Ellis* for appellant.

1. The record does not show whether, or not, a change of venue was ordered, as required by Sec. 7, p. 1356, Vol. 2, Wag. Stat., or, as permitted by Sec. 4, p. 1005, Vol. 2, Wag. Stat. It does show that the Greene circuit court exercised a jurisdiction which alone belonged to the circuit court of Dade county. Wag. Stat, Vol. 2, p. 1005, Sec. 3. The established rule in this State has been that, except when collaterally attacked, the proceedings should, affirmatively, show jurisdiction of the subject-matter of the suit. *Howard v. Thornton*, 50 Mo. 291; *Gilstrap v. Felts*, 50 Mo. 428; *Henderson v. Henderson*, 55 Mo. 534; *Hargis v. Morse*, 7 Kan. 417; *Steen v. Steen*, 25 Miss. 513; *Eager v. Stover*, 59 Mo. 88.

2. The acquiescence or consent of the parties, does not waive a jurisdictional defect as to the subject-matter. *Lindell v. Han. & St. Jo. R. R. Co.*, 36 Mo. 543; *Stone v. Corbett*, 20 Mo. 350; *Dodson v. Scroggs*, 47 Mo. 285; *Cones v. Ward*, 47 Mo. 289.

3. If the necessary jurisdictional facts do not appear upon the record, this court must conclude that they do not exist, in cases where the trial courts have been engaged in the exercise of special and statutory powers. *K. C., St. Jo. & C. B. R. R. Co. v. Campbell*, 62 Mo. 585; *Cunningham v. Pacific R. R.*, 61 Mo. 33; *State ex rel. v. Woodson*, 41 Mo. 231; *Hansberger v. Pacific R. R. Co.*, 43 Mo. 196; *State v. Metzger*, 26 Mo. 65; *Iba v. Han. & St. Jo. R. R. Co.*, 45 Mo.

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469; *McCloon v. Beattie*, 46 Mo. 391; *Schell v. Leland*, 45 Mo. 289; *Henderson v. Henderson*, 55 Mo. 534.

*Bray & Cravens* for respondent.

HOUGH, J.—This was an action of ejectment. The petition and answer were filed in the circuit court of Dade county, where the lands in controversy are situate. The subsequent proceedings were had in Greene circuit court. No order of the Dade circuit court founded upon the written consent of the parties to the removal of the cause to Greene county, as provided in the 4th section of the 3d article of the Practice Act, nor any order changing the venue in pursuance of the statute in relation to the change of venue in civil cases, is to be found in the record. The appellant now insists that the circuit court of Greene county never acquired jurisdiction of the subject-matter of the action, and that the proceedings therein were *coram non judice*.

The objection that the circuit court had not jurisdiction of the subject-matter of the action, may be made for the first time in this court. As the land sued for was situate in Dade county, the subject-matter of the action was not originally within the jurisdiction of the circuit court of Greene county, and it could only acquire jurisdiction thereof by operation of law. The consent of the parties could not confer it. An order of the circuit court of Dade county, transferring the cause to the Greene circuit court, was indispensably necessary to confer upon the latter court jurisdiction to try the cause. *Henderson v. Henderson*, 55 Mo. 534, 544.

As no such order appears in the record, the judgment of the circuit court will be reversed, and the cause will be remanded to the circuit court of Greene county, to be disposed of according to law. The other judges concur.

REVERSED.

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The State v. Treace.

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THE STATE v. TREACE, *Appellant*.

**Practice in Supreme Court:** BILL OF EXCEPTIONS. The Supreme Court will not consider objections to the competency of a juror, when the only evidence impeaching him consists of an affidavit attached to the record, but not copied in the bill of exceptions, or otherwise shown to have been before the trial court when the question of competency was presented to that court.

*Appeal from Newton Circuit Court.*—HON. JOSEPH CRAVENS,  
Judge.

A. J. Harbison for appellant.

J. L. Smith, Attorney-General, for respondent.

The affidavit is manifestly no part of the record herein and ought not to meet with any consideration on the part of the court.

NORTON, J.—The defendant was indicted jointly with one Jesse Lynch, in the circuit court of Newton county, for the murder of one Birdie Lynch. On a separate trial she was convicted of murder in the second degree, and sentenced to the penitentiary for thirty-five years and six months.

This case is in all respects like the case of *The State v. Jesse Lynch*, decided at the last term of this court, except the additional ground alleged in the motion for a new trial, that one Henry Vernichren, upon his examination touching his qualifications as a juror, did not disclose the fact, that he had formed and expressed an opinion in regard to defendant's guilt, when the fact was, that he had formed and expressed such opinion.

This cause assigned for a new trial in the motion is unsupported, unless we consider an affidavit attached to the record as affording such evidence. This affidavit is not copied in the bill of exceptions, it is not marked filed as a paper in the cause, and there is nothing to show that it

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was before the court when the motion was heard and determined.

Judgment affirmed, the other judges concurring.

AFFIRMED.

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THE STATE V. MAYFIELD, *Appellant*.

**An Indictment for Murder**, which fails to state where or in what year the deceased died, is bad.

*Appeal from McDonald Circuit Court.*—HON. JOSEPH CRAVENS, Judge.

*H. C. Young and C. W. Thrasher* for appellant.

*J. L. Smith*, Attorney-General, for the State.

HENRY, J.—The defendant was indicted for the murder of one John Cragh on the first day of May, 1875. Defendant contends that the indictment is defective, in not alleging, when or where the defendant died. It alleges that on the — day of May, 1875, defendant shot the said Cragh and that he died on the 3d day of May. It does not state where or the year in which he died. In the case of *Lester v. The State*, 9 Mo. 666, the indictment alleged that deceased “did instantly die of the wounds inflicted upon him by the defendant.”

The court held, NAPTON, J., that “time and place must be stated to the allegation, both of the injury and the death, in order that it may appear that the charge is cognizable by the court. (2 Chitty’s Crim. Law 737; Cro. Eliz. 738; 2 Hale 179.) Here the word instantly seems designed to supply the place of the words then and there; and the Attorney-General insists that both in its popular and proper legal acceptation, it will embrace everything which is conveyed by those words. This may be true, so far as time

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is concerned, but in capital cases, it has been thought expedient to require great strictness, and it would be difficult to foresee to what extent innovations would go, if we lose sight of the established precedents, so far as they fix the form of material averment." In the case of the *State v. Sides*, 64 Mo. 384, the allegation in the indictment was, "of which said mortal wound the said John Martin did immediately languish, and languishing did die."

NORTON, J., delivering the opinion of the court, said: "In the case at bar, the indictment only charges that the deceased 'did immediately languish, and languishing did die.' The allegation fails to show when and where he died," and it was accordingly held that the indictment was defective. The indictment, in the case we are considering, must be held bad, upon the principle announced in those cases. It neither alleges, when or where the deceased died. When precedents have long been sanctioned by repeated decisions of the courts, prosecuting attorneys had better follow them. Departures are dangerous, especially in criminal proceedings, in which greater particularity is required in pleadings than in civil cases, and technical rules still obtain, for which it is frequently difficult to assign a reason.

The judgment is reversed, and the cause remanded.  
All concur..

REVERSED.

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FLETCHER, *Trustee, &c.*, Appellant, v. DRATH.

1. **Verdict of Jury** CONCLUSIVE UPON WEIGHT OF EVIDENCE. The verdict of the jury, upon the weight of evidence, is, in this court, regarded as conclusive.
2. **Caveat Emptor** APPLICABLE WHERE PERSONAL PROPERTY IS NOT IN POSSESSION OF THE PARTY CLAIMING SAME. The doctrine of *caveat emptor* applies to one advancing money and taking a deed of trust upon personal property, not in the possession of the grantor in the deed of trust, but in the possession of a third party.



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3. **Fraud: ESTOPPEL.** A relinquishment of title to personal property obtained by imposition, is of no effect, and where such a relinquishment was so obtained from one who had purchased certain mules and wagons, but they were left in his possession, he was not estopped from showing the fraud as against one who subsequently advanced money on the security of the property to the former owner of it, but who neither knew of the relinquishment, nor received possession of the property. The doctrine that where one of two innocent parties must suffer, that one must be the sufferer who gave occasion to the wrong, has no application to such a case.

*Appeal from Johnson Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

In this suit plaintiff claimed the possession of specific personal property. Henry M. Malone was, originally, the owner, and in possession of the property. Both parties claimed title directly from him; the plaintiff, as trustee, under a deed of trust, executed, to secure advances made and to be made to him, dated September 6th, 1871, and under authority from him, contained in an instrument of writing dated November 4th, 1871, to take possession of the property; the defendant, under a bill of sale, dated and executed March 18th, 1870, and possession of the property from that time until the commencement of the suit. To destroy the effect of the bill of sale under which defendant claimed, plaintiff offered in evidence a receipt for \$1,800, dated April 27th, 1871, and signed by defendant, purporting to annul the bill of sale, and relinquish all rights to the property. Defendant claimed, however, that this receipt was fraudulently obtained by Malone. Other facts appear in the opinion of the court.

*Graves & Wood* for appellant.

1. Defendant is estopped from denying that the release or receipt is valid as to this plaintiff. It was his duty to know the contents thereof, and he cannot now be heard to plead his ignorance, so far as to injure this plaintiff

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who is an innocent party. *Capital Bank v. Armstrong*, 62 Mo. 67; *Trigg v. Taylor*, 27 Mo. 245.

*Crittenden & Cockrell* for respondent.

1. This court will not disturb a verdict after a refusal to grant a new trial on the ground that the evidence does not support the verdict, except in cases where gross wrong has been done. *State v. Anderson*, 19 Mo. 246; *Price v. Evans*, 49 Mo. 396; 3 Central Law Journal 752.

2. That possession is *prima facie* evidence of ownership, is one of the oldest principles of law. Law 5th of table 6, of the twelve tables of Roman law, provided that "In litigated cases the presumption shall always be on the side of the possessor." Cooper's Justinian, page 660, (appendix); 60 Pa. St. 384.

3. Malone conveyed to plaintiff only such title as he possessed. Not being in possession, the maxim, *caveat emptor*, applies. Kent's Comm., Vol. 2, p. 608, side page 478; Cooper's Justinian, Lib. 2, Tit. 6, Sec. 2, p. 97: *Spaulding v. Brewster*, 50 Barb. 142.

NAPTON, J.—This suit depends solely on questions of fact, on which the evidence is very contradictory. There were two trials of the case, in the first of which the jury did not agree, and in the second a verdict was found for defendant.

The question was between two railroad contractors, as to the title to certain mules and wagons. These contractors had been in partnership in Kansas, and it was natural that the witnesses, who were teamsters for one or the other, should differ as to the question of possession. The jury was competent to decide this, where the evidence was conflicting, and they did so. It is not clear that this court could have determined the facts more correctly—but it is certain that this court will only review the finding of a jury, when the judge, presiding at the trial, has given improper instructions. Where no evidence is submitted,

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having any tendency to establish the plaintiff's case, the judge superintending the trial may give such directions as will necessarily lead to a non-suit. So far, his competency is recognized—but upon the weight of evidence submitted on both sides, the determination of the tribunal selected by the law to determine this, is conclusive. Juries are supposed to be the best tribunals to try questions of fact.

In this case, the only question of law submitted to the court, related to the validity of a paper signed by the defendant, Drath, resigning his title to the property in controversy to Malone, the grantor in the deed of trust, which, if genuine, would, of course, have had a material influence in the determination of the case for the plaintiff. The instruction given by the court, was as follows:

“If the jury believe, from the evidence, that prior to and on the 18th of March, 1871, Henry M. Malone was the owner and in possession of the property sued for, and on said 18th of March, in consideration of eighteen hundred dollars, owing by said Malone, sold and delivered said property to defendant, Drath, and that said defendant, Drath, has, since said purchase, remained in possession of the same up to the commencement of plaintiff's action, then the jury will find for the defendant. And if the jury believe, from the evidence, that said Malone did so sell and deliver said property to the defendant, then the law presumes that said Drath continued in possession thereof, and the burden of proof is on plaintiff to show to the satisfaction of the jury that the ownership of said property was transferred back from Drath to Malone, prior to said 6th of September, 1871; and, although the jury may believe that the name of Adam Drath, to the paper read in evidence by the plaintiff, dated April 27, 1871, and purporting to be a receipt from Drath to said Malone, and resigning said property back to said Malone, is the genuine signature of said Drath, yet, if the jury believe, that the defendant is of foreign birth and unable to read writing in the English language, and that said Malone procured his signature thereto

after night, by representing to said defendant that said writing was an order on his lawyer to pay over to said Malone, money collected from one Welchwood, the jury will disregard such evidence, &c."

The propriety of the instruction will be better understood by stating that there were two papers in regard to this property, submitted in evidence—one dated at Marysville, in Kansas, and on the 18th of March, 1870, purporting to be a receipt from the defendant, Drath, by Malone, of the sum of eighteen hundred dollars, in full of the property now sued for, and filed for record at Carrollton, Carroll county, Mo., on the 8th of June, 1871. The other was dated Carrollton, Carroll county, Missouri, April 27, 1871, and is as follows: "Received of Henry M. Malone, the sum of eighteen hundred dollars as cash, forwarded on property and stock belonging to him, and in the firm of Malone & Drath, the same bill of sale, mortgage or note of property to be marked null and void. I resign Henry M. Malone's property back into his own hands, this day and date written. Witness my hand and official seal, Adam Drath." There was evidence to show that this last paper, signed by Drath, was procured by fraud—and whether this was so or not, was purely a question for the jury, and certainly the court properly instructed the jury to disregard it, if they were satisfied that Drath was imposed upon. The doctrine invoked against the instruction, that where one of two innocent parties must suffer, that one must be the sufferer who gave occasion to the commission of the wrong, has no application to such a case. The case was not one of negotiable securities, nor did it appear that the plaintiff had any information, whatever, in regard to either of these papers. One of the papers had been recorded—but that gave it no additional validity, and the other, the one supposed to be a fraud, was not recorded at all; nor did the trustee, so far as appears, know of its existence. The plaintiff was, it is presumed, governed by the fact of possession, on which, if he had not been mistaken, according to the

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finding of the jury, he might have safely relied. The alleged relinquishment of Drath had no tendency; whatever, to mislead him, inasmuch as he knew nothing of it, and it was not a paper of which he was bound to take notice.

The judgment must be affirmed; the other judges concur.

AFFIRMED.

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THE STATE *ex rel.* HOUSTON v. WILLIS, *Warden of the Penitentiary.*

1. **Larceny:** STATUTES CONSTRUED. By section 25, chapter 201, General Statutes of 1865, the stealing of property of the value of ten dollars or more, constituted grand larceny; and by section 27 the stealing of property under the value of ten dollars, constituted petit larceny. By the act of March 1st, 1877, (Sess. Acts 1877, p. 241,) these sections were amended by raising the value necessary to constitute grand larceny to twenty dollars, and by making the stealing of less than twenty dollars petit larceny. A person indicted for stealing property of the value of ten dollars before the passage of the act of 1877, pleaded guilty after the act took effect, and was sentenced to two years imprisonment in the penitentiary, the penalty prescribed for grand larceny. An act in force at the time the offense was committed, (Wag. Stat., 895, § 6) provided that "no offense committed, and no penalty \* \* incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses and the recovery of such penalties \* \* shall be had in all respects as if the provision had remained in force."

*Held, 1st,* That section 6 applies as well to cases where a statute has been amended as where it has been absolutely repealed;

*2nd,* That the act of 1877 is, by its terms, prospective, and does not apply to offenses previously committed;

*3rd,* That the sentence as for grand larceny was therefore proper.

PER SHERWOOD, C. J.

2. **Ex post facto laws.** The Legislature has no power to change the punishment of an offense by a statute passed after it is committed. Such legislation is *ex post facto*; and, except where such change



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consists in the remission of some separable portion of the punishment, a statute making it must be held constitutionally inapplicable to antecedent transactions. The court cannot inquire whether it should not be applied in every case where it may be supposed to mitigate the punishment; for there is no test by which to determine whether it has that effect.

*Petition for Habeas Corpus.*

The petitioner, Houston, was indicted for stealing personal property of the value of ten dollars. He pleaded guilty, and was sentenced to two years imprisonment in the penitentiary. The other facts appear in the opinion of the court.

*Louis Houck and Henry Flanagan* for relator.

1. The change in the law defining petit larceny enured to Houston's benefit. Section 6, p. 895, Wag. Stat., does not apply, because the act of 1877 does not repeal, but only amends the sections of the General Statutes defining larceny.

2. It was competent for the Legislature notwithstanding the General Statute, to modify the punishment of crime, and if an act reduces the punishment, or prescribes a penalty less severe, leaving the act in force which defines the crime, it cannot be said that Sec. 6 above quoted, saves the act amended, and that the offense must be punished according to the provisions of the latter. The act is in mitigation of punishment, and is not a repeal of an existing law. We submit, therefore, that the old punishment as to offenses committed before the passage of the act of 1877 is not revived. Cooley on Con. Lim., 267 *et seq.*

*J. L. Smith*, Attorney-General, for respondent, cited Wag. Stat., p. 456, § 25; p. 894, § 3; p. 895, § 6; R. S. 1835, p. 385, §§ 37, 38; *Rogers v. Pacific R. R. Co.*, 35 Mo. 153. Section 7, Wag. Stat., p. 894, applies only to actions pending at the time the General Statutes of 1865 went

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into effect. R. S. 1835, p. 385-6, § 39; R. S. 1845, p. 698, § 16; R. S. 1855, p. 1025, § 16.

SHERWOOD, C. J.—The object of this writ is to test the legality of the confinement of Houston in the penitentiary, pursuant to judgment and sentence of the Scott circuit court for grand larceny, the crime being committed and indictment found prior to January 1st, 1877, though the trial did not occur until after an act went into effect, changing in certain cases what was theretofore known as grand larceny into petit larceny, and making also different provision for the punishment of crimes of the class for which the prisoner received his sentence. Passing over all mere preliminary questions, we proceed to discuss the merits of the case.

The act referred to was approved March 1, 1877, went into effect July 28th of that year, and is as follows: § 1. That section 25 of chapter 201 of the General Statutes of Missouri, be, and the same is hereby amended by striking out the word "ten" and inserting the word "twenty," so as to read as follows: § 25. Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, right in action, or other personal property or valuable thing whatsoever, of the value of twenty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, neat cattle, sheep or hog belonging to another, shall be deemed guilty of grand larceny.

§ 2. § 27 of the same chapter of the General Statutes be, and the same is hereby amended by striking out the word "ten" and inserting the word "twenty," so as to read as follows: § 27. Every person who shall steal, take and carry away any money or personal property or effects of another, under the value of twenty dollars, (not being the subject of grand larcery without regard to value,) shall be deemed guilty of petit larceny, and on conviction shall be punished by imprisonment in the county jail not exceeding

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one year, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment.

Section 6, (2 W. S., 895,) provides that: "No offense committed, and no fine, penalty or forfeiture incurred, previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses, and the recovery of such fines, penalties and forfeitures, shall be had in all respects as if the provision had remained in force."

This section must be held as decisive of this case. According to it, had the old statute been absolutely repealed, the prisoner must still have met with punishment "in all respects as if the provision had remained in force." This is precisely the view taken of the effect of this section in *State v. Mathews*, (14 Mo. 133,) Mr. Justice Ryland in that case holding that the section just quoted, operated as a "saving clause" in the prevention of the operation of the repeal. Shall an amendment, a partial repeal, accomplish more than could a total one? This question would seem to furnish its own answer.

Besides, the language of the act of March 1st, 1877, is directed to the future and not the past: "Every person who shall steal," &c. And the general rule of construction is that legislation is to be regarded as prospective and not retrospective in its operation. *State v. Hays*, (52 Mo. 578); *Lewis v. Brackenridge*, (1 Blackf. 220.) This is especially true of laws relating to crimes and their punishment. There is positively nothing in the act under consideration, even remotely indicative of legislative intention, either to abrogate section 6, *supra*, or to affect in the slightest degree, antecedent criminal occurrences; and in my opinion if the legislature had evinced in the act of 1877 the most decided intention of making that act applicable to the punishment of prior transactions, it is to the last degree doubtful whether such act, regard being had to the terms thereof, would not have been violative of the constitutional prohi-

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bition respecting *ex post facto* laws, i. e., criminal laws retrospective in their operation. A law of this description is said to be one "which renders an act punishable in a manner in which it was not punishable when committed." Laws, however, which mitigate the character or punishment of a crime already committed, may not fall within the prohibition, for they are in favor of the citizen." (2 Story on Const., § 1345 and cases cited.)

The first definition of an *ex post facto* law above given that it "renders an act punishable in a manner in which it was not punishable when it was committed," is readily understood; a bare inspection of the former and subsequent acts will speedily show whether any change has been made in the punishment to be inflicted. But the ground becomes vastly more debatable when the inquiry arises upon a particular statute, whether it does indeed mitigate the previously imposed punishment. There has been great diversity of opinion as to what in this connection, constitutes mitigation. In Texas, it has been held not to mitigate the punishment, where, for the death penalty was substituted the infliction of stripes, and this upon the ground of the peculiarly degrading character of the latter method of punishment, (*Herber v. State*, 7 Tex. 69). On the other hand in South Carolina, where the punishment, death, was before final judgment changed to fine, whipping and imprisonment, the new law was applied in passing sentence, (*State v. Williams*, 2 Rich. 418). In Indiana the law in force, punished perjury, by not exceeding 100 stripes. In a certain case, before trial, the punishment was changed to imprisonment in the penitentiary, not exceeding seven years. (*Strong v. State*, 1 Blackf. 193,) and the last act was held applicable and not obnoxious to constitutional objections. This decision has, however, met with criticism from Mr. Bishop, (1 Bish. Cr. L., § 219). On this point, Mr. Justice Cooley, with much pertinency, remarks: "But, what does go in mitigation of the punishment? If the law makes a fine less in amount, or imprisonment shorter in point of

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duration, or relieve it from some oppressive incident, or, if it dispenses with some severable portion of the legal penalty, no embarrassment would be experienced in reaching a conclusion, that the law was favorable to the accused, and, therefore not *ex post facto*. But who shall say, when the nature of the punishment is altogether changed, and a fine is substituted for the pillory, or imprisonment for whipping, or imprisonment at hard labor for life for the death penalty, that the punishment is diminished, or at least not increased by the change made? What test of severity does the law or reason furnish in these cases? And must the judge decide upon his own view of the pain, loss, ignominy and collateral consequences usually attending the punishment? Or may he take into view the peculiar condition of the accused, and upon that determine whether, in his particular case, the punishment prescribed by the new law is more severe than that under the old or not?" (Cooley Const. Lim., 267). This view of the learned author, is in accord with decisions on this question in the State of New York, which meet with his evident approval.

In *Hartung v. People*, 22 N. Y. 105, Mr. Justice Denio speaking for the court said: "It is enough to bring the law within the condemnation of the constitution, that it changes the punishment after the commission of the offense, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be most severe in a given case. That would depend upon the disposition and temperament of the convict. The Legislature cannot thus experiment upon the criminal law.

\* \* It is enough, in my opinion, that it changes the punishment in any manner, except by dispensing with divisible portions of it." This line of decision, which has become settled law in New York, (*Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*, 29 N. Y. 124; *Kuckler v. People*, 5 Park. Cr. Rep. 212,) I regard as enunciating the better doctrine, since it is easily understood, and the two-fold test which it furnishes, readily applied, viz: Has a



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change been effected in the prescribed punishment? If there has, and such change has not been brought about by a mere remission of some separable portion thereof, then the law, professing to effect such change, must be held, so far as concerns antecedent transactions, constitutionally inapplicable. Subjected to this test, the act of March 1st, 1877, cannot be held to apply to a crime committed anterior to its passage; for holding the above expressed views I shall not undertake to determine whether it would be more onerous upon the accused to suffer punishment in the penitentiary, under the old law or under the new, by imprisonment in the county jail, or by a fine, or by both fine and such imprisonment. Whether, then, reliance be placed upon the decisive provisions of section six, *supra*, or upon the constitutional inhibition, before noted; in either event, the result must be that the relator must be remanded into the custody of the Warden, and it is thus ordered.

My associates concur with me in the foregoing remarks, except that portion relating to the power of the Legislature, by the passage of a law to affect crimes of anterior commission; on this point, deeming it unnecessary, they decline the expression of opinion.

HOUGH, J., CONCURRING.—I concur in the judgment of the court remanding the prisoner to the custody of the warden.

I do not conceive that there is any constitutional question in this case. The act of March 1st, 1877, reducing the grade of the offense committed by the relator from grand larceny to petit larceny, is, by its terms, as well as by the provisions of the General Statutes, applicable only to offenses committed after the passage of the act, and this view of that act disposes of the case.

PRISONER REMANDED.

THE STATE V. CHRISTIAN, *alias* WHITE, *Appellant*

1. **Homicide: EVIDENCE: RES GESTAE.** A homicide occurred about eleven o'clock at night; the testimony of defendant's mother was to the effect that defendant came to the house on the same night between eleven and twelve o'clock, and aroused her from sleep, when she got up and let him in; that he had blood on his face and hands, and told her he had had a difficulty with a student, and had cut him; that he had a knife in his hands with blood on it; except from this testimony, it did not appear how much time had intervened between the cutting and the arrival of defendant at his mother's house, and it did not appear how far she lived from the scene of the homicide; defendant's counsel proposed to identify the knife by the mother, to which the State objected, and the objection was sustained, on the ground that there was no evidence tending to show that the killing was done with the knife proposed to be identified; *Held*, that the objection was properly sustained upon the ground, if no other, that defendant had ample time and opportunity between the occurrence of the difficulty and his arrival at his mother's house to cast away, or conceal the instrument, with which the cutting was done, and substitute the knife in question in its stead.
2. **Harmless Error in Instructions: MURDER.** Defendant sustains no injury from erroneous instructions relating to murder in the first degree, where he is only convicted of murder in the second degree; and for the giving of such instructions the judgment will not be reversed.
3. **Where Instructions are given, stating a legal principle in approved language, it is not necessary to repeat the same principle in other instructions in different words.**
4. **Reasonable Doubt.** Instructions, relating to the question of reasonable doubt, are objectionable, if the jury are not told what a reasonable doubt is. They are also objectionable, if they instruct the jury that, if they have a reasonable doubt as to the evidence of any fact necessary to make up the offense, they must acquit; the accused is only entitled to an instruction relative to the consequences of a reasonable doubt as to his guilt on the whole evidence in the case, and has no right to select a single material fact, and ask the court to direct the jury that, if they have a doubt as to the existence of such fact, they must acquit.
5. **Manslaughter: MURDER: AGREED COMBAT: SELF-DEFENSE.** When all the facts in the case show that the defendant sought and brought on the difficulty, which resulted in the death of his adversary, he is not entitled to have the court instruct the jury in relation to

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The State v. Christian, *alias* White.

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manslaughter; nor can he avail himself of the right of self defense, however imminent the danger in which he may have found himself in the progress of the affray; and when parties, by mutual understanding, engage in a conflict, and death ensues to either, the slayer will be guilty of murder; and although, when the combat is the immediate consequence of a sudden quarrel, and not an act of deliberation or agreement, the slayer may not be guilty of murder, yet, if he, under color of fighting upon equal terms, uses from the beginning of the contest a deadly weapon, without the knowledge of the other, and kills, or when at the beginning he prepares a deadly weapon, so as to have the power of using it in some stage of the contest, and does use it, and kills the other party with it, the killing will amount to murder.

*Appeal from Boone Circuit Court.*—HON. G. H. BURCKHARDT,  
Judge.

*Turner Sebastian and Peirce & Rollins* for appellant.

1. The court erred in excluding the testimony of Mrs. White. *Crowther v. Gibson*, 19 Mo. 365; *Harriman v. Stowe*, 57 Mo. 93.

2. In overruling defendant's objection to instructions 5 and '10, given to the jury at the instance of the State. *State v. Underwood*, 57 Mo. 40; Russell on Crimes, Vol. 1, §§ 527, 528, 529.

3. In refusing to give instructions 2, 3, 4, 5 and 6, as prayed by defendant. Warton's Am. Crim. Law, §§ 974, 985, 986.

4. And in instructing the jury, of its own motion, as set forth in the qualification of instruction 8. *State v. Underwood*, 57 Mo. 40.

*J. L. Smith*, Attorney-General, for the State.

1. The court did not err in refusing to allow defendant's counsel to ask one Mrs. White, (mother of defendant,) if she could identify a certain knife, shown to her, as the one defendant had in his hand, when he came home on the evening of the killing. There was no evidence showing, or tending to show, that this was the knife with which the

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killing was done. It is true the testimony tends to show that the killing was done with some sharp instrument, but the exact kind of an instrument, even, is unknown. The fatal wound may have been inflicted with a very different instrument than this knife, and there is nothing shown, either as to time or place, except the mere fact of defendant's having a knife when he arrived at home, which, in anywise, connects the knife offered in evidence with the killing. It is not shown to be a part of the *res gestae*, and, hence, is inadmissible. 1 Greenleaf Ev., Sec. 108; *Merchants' Bank v. Berthold*, 45 Mo. 527; *Brownell v. Pacific R. R.*, 47 Mo. 239; *Harriman v. Stowe*, 57 Mo. 93. Again, the declarations and conduct of a defendant, not on the occasion of the killing, in his own interest, are not admissible in evidence; he cannot manufacture testimony in his own behalf. *McLean v. Rutherford*, 8 Mo. 114.

2. There was no error in the giving of instructions 5 and 10 for the State. Wag. Stat. Vol. 1, p. 446, Sec. 2; *State v. Kennedy*, 20 Iowa 569; *State v. Benham*, 23 Iowa 154; *State v. Hays*, 23 Mo. 287; *State v. Starr*, 38 Mo. 270; *State v. Shoultz*, 25 Mo. 152; *State v. Green*, 37 Mo. 466; Russell on Crimes, (Ed. of 1845,) Vol. 1, pp. 527, 528, 529, 530, 531, 537; 1. East P. C., Ch. 5, § 24, p. 241; *State v. Scott*, 4 Iredell 409; *State v. Underwood*, 57 Mo. 49; *State v. Hudson*, 59 Mo. 137. A conviction of the crime of murder in the second degree necessarily acquitted him of murder in the first degree. To reverse this case because an instruction on a grade of homicide of which the appellant was acquitted, was erroneously given, would be practically allowing him to take advantage of an error in his favor.

3. The court rightly refused to give instructions Nos. 2, 3, 4, 5 and 6, as asked by defendant, and did not err in adding the qualification to defendant's instruction No. 8. *State v. Harris*, 59 Mo. 556; *State v. Hudson*, 59 Mo. 138; *State v. Schoenwald*, 31 Mo. 147; *State v. Starr*, 38 Mo. 270.

4. Instructions given, Nos. 1 to 17, (including 8 and

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11 refused,) for plaintiff; 1, 7 and 8 for defendant, as a whole, fully declared the law of the case, and if that be so, then there is no reversible error. *State v. Hudson*, 59 Mo. 138; *State v. Shoultz*, 25 Mo. 155.

NORTON, J.—Defendant was indicted at the April term 1876, of the Boone county circuit court, for murder in the first degree, in killing one Sydney E. Smith. He was duly arraigned and put upon his trial at the August term, 1876, of said court, which resulted in his conviction of murder in the second degree, and the assessment of his punishment to fifteen years imprisonment in the penitentiary.

The motions of defendant for new trial and in arrest of judgment having been overruled, he brings the cause to this court by appeal. The causes relied upon for a reversal of the judgment, are the alleged errors of the court in excluding legal evidence, and in giving improper and refusing proper instructions.

The mother of defendant was introduced as a witness on the trial, and testified that defendant came to her house on the night of March 4th, 1876, between eleven and twelve o'clock; that she was asleep when he came, and on being aroused, she got up and let him in; that he had blood on his face and hands, and told her that he had had a difficulty with a student and had cut him; that defendant had a knife in his hands with blood on it. The counsel of defendant then proposed to identify the knife by her, to which the State objected, which objection was sustained on the ground that there was no evidence tending to show that the killing was done with the knife proposed to be identified. We are at a loss to perceive on what principle the rejected evidence could have been received. The killing took place about eleven o'clock of the night of March 4th, 1876. Immediately after the stabbing, resulting in the death of deceased, was done, defendant fled. How much time elapsed between the cutting and the arrival of defendant at the house of

1. HOMICIDE: evidence: *res gestae*.



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his mother, does not appear, except from her statement that she was aroused from sleep by defendant between eleven and twelve o'clock, nor does it appear how far she lived from the scene of the homicide. What defendant said or did after he reached the house of his mother between a half hour and hour after the tragedy was enacted, does not constitute a part of the *res gestae*. To thus extend the rule would be laying down a dangerous precedent under cover of which persons charged with homicide could manufacture evidence in their own favor. We think that the objection was properly sustained upon the ground, if no other, that defendant had ample time and opportunity between the occurrence of the difficulty and his arrival at the house of his mother to cast away or conceal the instrument with which the cutting was done, and substitute the knife in question in its stead.

Seventeen instructions were asked for by the State, all of which were given except the eleventh. To the fifth and tenth defendant excepted. The two instructions thus excepted to relate to the offense of murder in the first degree, and as defendant was convicted only of murder in the second degree, he has sustained no injury thereby, though they might be open to the objections urged against them by counsel. No exceptions were taken to the instruction given by the court relating to the offense of which defendant was convicted, and no objection has been urged to it here.

Exceptions were also taken to the action of the court in refusing instructions numbered 2, 3, 4, 5 and 6, asked for by defendant. The second and fourth of the refused instructions relate to the question of reasonable doubt, and as the court had given the usual instructions embracing that subject in language often approved by this court, it was unnecessary to repeat the same principle in other instructions in different words.

Besides this, the instructions as asked were objectionable in their phraseology, and were calculated to mislead

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4. REASONABLE  
DOUBT.

in this, that in neither of them was the jury told what a reasonable doubt was. They were also objectionable because the court was asked to instruct the jury that if they had a reasonable doubt as to the existence of any fact necessary to make up the offense, they must acquit. This instruction was in direct conflict with the ruling of this court in the case of *State v. Schoenwald*, 31 Mo. 147, where it was held that the court committed no error in refusing an instruction to the effect that if all the facts and circumstances left it in doubt whether defendant, or some other person, inflicted the fatal blow, they could not find defendant guilty. It is the well settled law here that the accused is only entitled to an instruction relative to the consequences of his guilt on the whole evidence in the case, and that he has no right to single out each material fact necessary to be found, and ask the court to direct the jury that if they have a doubt as to the existence of such fact, they must acquit.

The third, fifth and sixth instructions were to the effect that if defendant and deceased engaged in a mutual combat, and such combat became unequal by reason of the greater physical strength of the deceased, and defendant, in the heat of blood engendered by the conflict, stabbed the deceased with a deadly weapon, without the design to effect death, and the killing was neither justifiable nor excusable, they will find defendant guilty of manslaughter in the third degree, unless they should further find that said combat was entered into with the design and purpose to kill the deceased, or to do him great bodily harm.

These instructions were refused, and the court gave the following: "If the jury believe from the evidence that defendant and deceased engaged in mutual combat, and that such combat became unequal by reason of the greater physical strength of the deceased, and that defendant's blood became heated on lawful provocation, that defendant, in such heat of blood, with a deadly weapon, and

5. MANSLAUGHTER:  
murder: agreed  
combat: self-de-  
fense.

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without a design to effect death, stabbed and killed the deceased, and that such killing is neither justifiable nor excusable, you can find defendant guilty of no crime greater than manslaughter in the third degree, unless you shall further find that defendant and deceased had a mutual understanding and determination to engage in such conflict or fight."

This instruction, when applied to the facts of this case, is as favorable to the defendant as the facts developed in the evidence would warrant. It appears from the evidence that on the night of the 4th of March, the defendant and one Kennard met Smith, the deceased, at Gilman & Dorsey's drug store, in Columbia. On that occasion Kennard walked up to Smith and said your name is Haistings; you are the man who whipped A. P. Clarkson, but by G—d you can't whip me. Smith, the deceased, replied, you are mistaken; my name is not Haistings. Kennard remarked you said your name was Haistings. Kennard was then told by some one present that the name of deceased was not Haistings; to which he replied that it was, and that he carried a pistol to shoot such men as him. Deceased, in company with witness Winston, then left the drug store and went to a barber shop. Shortly afterwards Kennard and defendant followed them to the barber shop; Kennard staring insolently at the deceased when he came in. Deceased and witness Winston shortly afterwards left the barber shop and were followed by Kennard and defendant, and having gone twenty-five or thirty yards, Kennard and Smith got into a quarrel about Smith's name being Haistings. He was told by the witness Winston that he was mistaken, that the name of deceased was Smith, and not Haistings. White, the defendant, then spoke up and told Kennard to give Smith a drink of whisky, in a laughing, sneering manner, which provoked Smith to anger. Smith, in company with Winston, then started to their boarding house, and having gone a few steps, defendant called to him to stop and come back and get that drink Kennard

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was going to give him, whereupon deceased replied, and told him to take his whisky and go to h—l with it, further adding that, if White would come up to him he would whip him. White went up, and Smith declined by saying that he had no money to pay fines for whipping children. They quarreled and cursed each other for some time, White during the time, patting Smith on the arm, saying he could whip him. Kennard stepped in between Smith and White, and asked Smith if he considered him a child or boy, when defendant came up between deceased and Kennard, and began quarreling and patting Smith on the arm. Smith finally said to defendant that, if he would come out in the street he would whip him, and let the fine go to h—l. Smith went out into the street a little, White following just behind, Kennard and Winston behind the two. White and Smith stepped about the middle of the street and began pushing each other with their arms. They struck two blows each, on each other's arms. White then jumped up to Smith and struck him, jumped backward, turned and ran off. Smith, with the blood spurting from his neck, remarked that he was cut. Winston led Smith five or six steps back to the pavement, when deceased said he was dying, and fell forward on his head in the street. He died, according to the evidence, in five minutes, or less, after he was cut, the external carotid artery having been severed. The evidence does not show that deceased had a weapon of any kind.

It is plainly inferrible from the above facts, that the difficulty was sought for and brought about by defendant. The deceased was followed from place to place by Kennard and White, who seemed to be acting in concert, first one and then the other using provoking language, and when Smith had left for his boarding place, defendant called to him to stop and take a drink, after full knowledge on his part, that he had already provoked him by his words, and that Smith had started home. When Smith declined to fight him, defendant continued his provocation by patting him

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on the arm in an angry manner, telling him he could whip him, until deceased finally agreed that he would fight him, if he would go out into the street, evidently intending a fair fight without weapons, a trial of natural strength. The proposal was accepted by defendant, but not in the spirit in which it was made, as the sequel proved. It is true that no weapon was seen in the hands of defendant at the time of the stabbing, but the severance of the artery in the neck establishes the fact that defendant inflicted the fatal blow with a dirk knife, or some other sharp and deadly weapon.

The circumstances surrounding the tragedy lead irresistibly to the conclusion that White must either have had the weapon with which he inflicted the wound in a position to be used, when he came up to Smith on the pavement for the purpose of fighting him, or must have drawn or prepared it for use, after he had accepted Smith's proposal to go out in the street and fight, and while he was following him out. It seems to be clear that he did not draw or prepare the weapon after the conflict began, for the only witness who saw the difficulty and testified in regard to it, swears that they struck each other twice on the arms, when defendant jumped up to Smith, struck him, turned, and ran. While engaged in striking each other's arms he could not have drawn and prepared the weapon used by him, and the witness does not state that he saw defendant draw any weapon. Under this view the court might well have declined to instruct the jury as to any degree of manslaughter, for every fact in the case goes to show that defendant sought and brought on the difficulty.

It has been held, by this court, that it is the well settled doctrine that a party who seeks and brings on a difficulty, and voluntarily engages in it, cannot avail himself of the right of self-defense, in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the affray. *State v. Underwood*, 57 Mo. 40;



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*State v. Starr*, 38 Mo. 270; *State v. Linney*, 52 Mo. 40. It was also held in the case of the *State v. Underwood*, that when parties, by mutual understanding, engage in a conflict, and death ensues to either, the slayer will be guilty of murder. When the combat is the immediate consequence of a sudden quarrel, and not an act of deliberation or agreement, it might be different; but even in cases of this kind the conclusion of malice may be reached, if the party killing began the attack with circumstances of undue advantage. When a party, under color of fighting upon equal terms, uses, from the beginning of the contest, a deadly weapon, without the knowledge of the other, and kills, or when, at the beginning, he prepares a deadly weapon, so as to have the power of using it, in some part of the contest, and does use it, and kills the other party with it, the killing will amount to murder. 1 Russell on Crimes 529, 531. Under the facts of the case, and the law as applicable to them, the court rightfully refused the third, fifth and sixth instructions. The instruction given by the court in the place of those refused, was more favorable than the facts warranted.

The sixth instruction given on behalf of the State, which was not excepted to in the court below, but is complained of here, is a copy of an instruction approved by this court in the case of the *State v. Shoultz*, 25 Mo. 153.

Judgment affirmed; with the concurrence of the other judges.

AFFIRMED.

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THE STATE V. ALEXANDER, *Appellant*.

1. **Homicide with a Dangerous Weapon:** MALICE: REASONABLE DOUBT. If one intentionally kills another with a dangerous weapon, the law presumes that the killing is malicious, and it devolves upon the slayer to adduce evidence to meet or repel that presumption. If he succeeds in adducing sufficient evidence to create in the minds of the jury a reasonable doubt of his guilt, he is entitled to an acquittal.
2. **Intentional Homicide:** INSTRUCTIONS. Where the uncontradicted evidence shows that a homicide was intentionally committed, and the only question in the case is whether the act was done in self-defense or not, it is error for the court to give the jury an instruction based upon the hypothesis of a killing without a design to effect death.
3. **Evidence of Character.** The good character of the accused is an ingredient to be submitted to the jury like any other fact, and evidence to prove good character is admissible in every criminal case. If the jury believe the accused to be guilty, they must not acquit him because he has borne a good character; and on the other hand if all the other evidence, taken by itself proves him guilty, they must not, for that reason, fail to consider the evidence of character.
4. **Evidence of Threats.** Upon a trial for murder, evidence of threats made by deceased against defendant, is not admissible to justify the killing, but is admissible as conducing to show that an assault was first made by deceased upon defendant, when there is other evidence tending to prove such assault. When there is none such, evidence of threats is not admissible for any purpose.
5. **Change of Venue.** A refusal of a judge to admit to bail a prisoner charged with murder, is no evidence that he has prejudged the case, so as to entitle the prisoner to a change of venue.
6. **Practice, Criminal:** WHAT CONSTITUTES MISCONDUCT OF THE JUDGE AT THE TRIAL: JUROR CANNOT IMPEACH THE VERDICT. After the jury had retired to consider of their verdict in a criminal case, one of their number sent a note to the judge who presided at the trial, asking advice concerning the case, to which the judge made answer in writing. He also held a conversation with a juror as to how the jury stood upon the question of conviction, and permitted a bailiff to tell him, without rebuke, how they were divided. All these things were done in the absence of the prisoner and his counsel. *Held*, that they constituted a case of misconduct on the part of the judge, which entitled the defendant to a new trial. *Held*, also, that the juror was not a competent witness to impeach the verdict.

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*Appeal from Andrew Circuit Court.*—HON. HENRY S. KELLEY,  
Judge.

The defendant was indicted at the November term, 1873, of the Nodaway circuit court, for murder in the first degree in the killing of one Jacob Norrick. In December following, defendant made an application for bail to Hon. Henry S. Kelley, Judge of the court.

A trial was had upon this application, and evidence was introduced by the defendant for the purpose of removing the *prima facie* presumption of guilt raised by the indictment. The judge having taken the matter under advisement for several days, finally refused the application, delivering an elaborate written opinion, which concluded as follows: "Moreover, the evidence introduced by him, (Alexander) on the hearing, tending strongly to establish a premeditated killing, and being insufficient to repel the *prima facie* case made by the indictment, or to show that the presumption of guilt is not great, his application for bail will be denied. Let the defendant be remanded."

In January following, this opinion was published in full in the St. Louis Journal of Law, a legal periodical which circulated in Nodaway county. At the following March term, the defendant applied for a change of venue, charging that the judge was prejudiced against him, and had prejudged his case. The principal evidence adduced to sustain the charge was the above opinion, as printed. This application was refused. A subsequent application for a change of venue on the ground that the people of Nodaway county were prejudiced against defendant, was granted, and the case was sent to Andrew county, where the motion for a change of venue to some other circuit, on the ground of prejudice of the judge, was renewed and again overruled. There were two mis-trials. Upon the third trial, at the October term, 1875, the defendant was found guilty of manslaughter in the second degree, and

sentenced to imprisonment in the penitentiary for three years.

At this trial Alice Norrick, a witness for the State, testified that her father, the deceased, came home one night with cattle which he and Alexander brought from Kansas; that defendant came to her father's house next morning to get his, defendant's, gun; that he got it, and shot it off, and asked for shot with which to reload, saying he wanted to kill a rabbit; that she handed him some shot, but he said he wanted some larger; that she gave him some larger and he reloaded his gun, and went off about a quarter of a mile from the house to where her father was with the cattle; that she afterward heard the gun go off twice, and saw her father fall to the ground.

Eva Long, a witness for the State, testified that on the morning of the 19th of November, Kyler came for defendant to divide the cattle; that defendant got his gun and loaded it, and took it with him; that two or three days before this she had heard defendant say there would be trouble about the cattle; that he would take his gun and divide them his way, and if any body interfered, they would smell hell.

Frank Crook, for the State, testified: Defendant got on his horse where we were to divide the cattle; he then ordered his brother to drive a certain cow out of the herd. Norrick asked how he proposed to divide; defendant said he proposed to have the pick; Norrick said he proposed he didn't; defendant made some reply and again told his brother to drive out the cow; Norrick told defendant if he divided the cattle that way he must do it over his dead body; Norrick pulled off his coat, and defendant made some reply, did not understand what; they then went off some distance; Norrick said, stop, don't divide the cattle in that way; defendant then rose in his saddle and shot Norrick, who was about ten feet from him; Norrick was on foot; both were going in a walk; the defendant shot again, and Norrick fell dead, with a pretty large sized hole

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in his neck ; I came up and asked defendant if he had killed Jake, (meaning Norrick); he said he was afraid he had.

Kyler, a witness for the State, gave a similar account of the killing, and added : I rode off to Maryville to get the sheriff; on my return I met defendant on the road and talked with him. He said he had killed Norrick and thought they would hang him for it; said he was ready to die, had considered the deed.

Hooton, a witness for the defense, testified that while they were driving the cattle from Kansas, defendant and Norrick had a quarrel about dividing them, defendant claiming the right to pick, and Norrick denying that that was the contract; that Norrick drew a revolver, as he spoke, and said that if defendant insisted on dividing that way, he would shoot him; that defendant said he did not want any trouble, and got on his horse and rode off; that the night before the killing he heard a conversation at Norrick's house, between Norrick and Crook, in which Norrick said that if defendant undertook to take his pick of the cattle, he would kill defendant, or defendant would kill him; that Crook said he did not think defendant would undertake to pick, but if he did, he would have to kill them all, or they would kill him; that Crook was present when the shooting took place; had been with Norrick and defendant among the cattle in the early part of the morning, but left and went to Norrick's house, and when he returned, about five minutes before the shooting, he had a revolver at his waist; that Norrick began the conversation about dividing the cattle, by asking defendant how he proposed it should be done; to which defendant said that he proposed to have his pick, as was agreed in Kansas; that Norrick said he did not so understand the agreement, and if he did pick them, he would have to pick them over his dead body; that defendant then turned and rode away, saying he did not want any fuss; that he then directed his brother to cut out a particular cow from the herd; that



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Norrick then threw off his overcoat and body coat, and started towards defendant, saying, "come on boys; we will have it out now!" that Crook and Kyler, who were his sons-in-law, followed him; that Norrick walked up within six feet of defendant, carrying an unsheathed bowie-knife; that defendant raised his shot gun from the saddle, where it was lying, and fired without taking aim; that Norrick then advanced and threw up his right arm, with the bowie-knife in his right hand, saying that he was not afraid of his damned old shot-gun; that defendant's horse was walking away from Norrick; that when he had got within four or five feet, defendant fired a second time and killed Norrick; that Crook was about twenty feet from defendant, and was drawing his revolver at this time; that Kyler was about twenty feet from him in another direction, and was advancing on him.

Thompson Alexander, a brother of defendant, was present at the shooting, saw the knife in Norrick's hand during the quarrel, but did not see him raise it; heard him say "come on boys, let's have it out now." The rest of the testimony of this witness agrees in the main with that of Hooton.

William Hart testified, that Crook had told him, that if defendant had not got the drop on Norrick, Norrick would have cut his damned heart out. Defendant offered the depositions of Hall and Russell, who testified that about the 5th or 6th of November, 1873, they fell in with Norrick on the prairie in Ottawa county, Kansas; that Norrick was at the time in company with Alexander and another man, driving a herd of Texas cattle to Nodaway county, Missouri; that Russell offered to purchase the cattle, when Norrick replied that he did not know whether he could sell; that he had had some trouble that morning with one of his partners, a man named Alexander, and did not know whether he could or not; that Norrick, who appeared to be angry and had a pistol in his hand, said that that was the only thing, he supposed, that would ever

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bring a settlement between him and Alexander; that Alexander claimed a right to have the pick of the cattle, but that was not the agreement, and he, Norrick, would kill him unless they were divided according to agreement; that he had shown or drawn the pistol on Alexander that morning, and had told him what he would do unless they settled; that Alexander was from fifty to a hundred yards away when this conversation took place. The court refused to permit them to be read to the jury.

Crook being recalled by the State, denied that he had ever had any conversation with Norrick as to what they would do in case defendant insisted on his claim; and denied having any weapon when the killing occurred. Much other evidence was offered by the State by way of impeaching the witnesses for the defense. Other facts appear in the opinion of the court.

*Willard P. Hall* for appellant.

1. The court committed error in overruling the first application for a change of venue, on account of the prejudice of the judge of the court. It is true, that at the time this application was made, in March, 1874, the court had a discretion in the matter; but this was a judicial, not an arbitrary discretion. This court in the absence of evidence, would suppose this discretion was properly exercised. But in this case there is evidence, and the evidence shows a strong prejudice against defendant on the part of the said judge. He had refused defendant bail, and in his refusal said that "the evidence tended strongly to establish a premeditated killing." This opinion was reduced to writing, by the judge who gave it, and was by him furnished to the St. Louis Law Journal for publication, such a publication was inexcusable under the circumstances, and manifests such a bias on the part of the judge as to make him an unfit person to try this case. *State v. O'Rourke*, 55 Mo. 441.

2. The court committed error in overruling the second application for a change of venue, on account of the prejudice of the judge.

3. The court improperly excluded the depositions of Russell and Hall. They tended to show violent threats made by Norrick against defendant, with regard to the division of the cattle, which resulted in the killing of Norrick.

4. There is no evidence to base the sixteenth instruction on. All of the evidence shows that defendant shot deceased with the intent of killing him; and the sixteenth instruction was an attempt to coax the jury into a verdict against defendant, contrary to the law and evidence. It is true that a person indicted for murder in the first degree, may be convicted of any less degree of homicide. Yet the conviction must be of some degree which the evidence shows he is guilty of. *State v. Philips*, 24 Mo. 490; *State v. Sloan*, 47 Mo. 615; *State v. Alexander*, 56 Mo. 131; *State v. Lane*, 64 Mo. 324.

5. The court erred in giving the 13th instruction. That instruction is a commentary upon the evidence, and undertakes to tell the jury what weight they should give to the evidence of defendant's good character. Under our statute, when the court decides that evidence is competent, the jury are then the sole and exclusive judges of the weight they will give to it, and are not to be controlled in their determination by the advice or instruction of anybody. *State v. Hundley*, 46 Mo. 422; *State v. O'Connor*, 31 Mo. 391; *Barton v. St. L. & I. M. R. R.*, 52 Mo. 257; *State v. Henry*, 5 Jones N. C. 65; 1 Wharton Crim. Law, Sec. 643; 3 Greenleaf Ev., Sec. 25; 1 Bishop Crim. Proceed. Sec. 489. This instruction amounts to the declaration that character is of no value. It says that in a clear case character has no weight. In a doubtful case the jury must acquit. When, then, does character avail? 1 Wharton's Crim. Law, Sec. 644.

6. The conduct of the judge was improper in receiv-

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ing a communication from the jury in writing, and making a written answer to it in the absence of the defendant and his counsel. The answer of the judge to the written inquiry of the juror is equivalent to giving a new instruction to the jury, and is in violation of our statute, which requires the defendant, in case of this kind, to be present during the entire course of the trial. 25 Mo. 167; 49 Mo. 328; *Sargent v. Roberts*, 1 Pick. 337; 2 Graham & Waterman on New Trials, pp. 360 & 362; 14 Ohio 511; 51 N. Y. 561; *State v. Cross*, 27 Mo. 332; *State v. Schoenwald*, 31 Mo. 147; *State v. Braunschweig*, 36 Mo. 397; *State v. Jones*, 61 Mo. 232; *State v. Dooley*, 64 Mo. 148.

The conduct of the judge in conversing with the foreman of the jury about the case, in the absence of the defendant and his counsel, cannot be justified or excused. 3 Wharton Criminal Law, Sec. 3309; 1 Pick. 341; *Taylor v. Botsford*, 13 John. 486; *Benson v. Clark*, 1 Cowen 258; 24 Wendell 185; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 561; Graham & Waterman on New Trials, p. 358; *Holton v. State*, 2 Florida 498.

*Lafe Dawson* for appellant.

1. One of the fundamental maxims of the common law is, that no man shall be judge in his own case, and so firmly is this maxim imbedded in the substratum of our jurisprudence, that it applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. Cooley's Const. Lim. 411; *Wash. Ins. Co. v. Price*, Hopkins Chan. 1. When defendant filed his petition verified by affidavit in compliance with the statutes charging the judge with prejudice, and with having prejudged his case, did he not tender an issue in which the judge was an interested party? Impartiality is the first duty of a judge, and before he sits in judgment in any case, he should be certain that he has no bias, and if he has any (the slight-

est), he is disqualified. Bouvier's Law Dictionary, Title, Judge. After having written and published his opinions, as stated, was it possible for him to enter upon the trial of defendant's case with that degree of impartiality which should characterize all judicial proceedings?

2. The court erred in giving of its own motion instruction No. 16. This instruction was also calculated to mislead the jury, and in all probability did call their attention away from the real issue. The defense was justifiable homicide, and the appellant was either guilty of murder or he was justifiable; but the jury was improperly led away from that issue by this instruction. The idea that the appellant could not be prejudiced by this instruction, cannot be sustained. The court had no right to direct the attention of the jury away from the issue tendered by an instruction on manslaughter in the second degree. Manslaughter in the second degree, under our code, is an unintentional killing. See Sec. 11, page 447, 1 Wag. Stat.; and that there is no evidence to sustain this instruction requires but a slight perusal of the record to discover. It is error in any case to give instructions outside of, or not warranted by the evidence. *Franz v. Hiltbrand*, 45 Mo. 121.

3. The action of the court in receiving a written communication from one of the jurors in reference to the case, and answering said note in writing, on the 27th day of October, as charged in the 15th ground upon which a new trial was asked, is sufficient of itself to vitiate the verdict. After the cause had been committed to the jury by the charge of the judge, no communication whatever ought to have taken place between the judge and the jury, and any direction from him to them, either verbal or in writing, is improper, and will vitiate the verdict. *Sargent v. Roberts*, 1 Pick. 337; 2 Graham & Waterman on New Trials, p. 360.

4. The action of the judge of the court in calling or sending for the foreman of the jury and holding a private conversation with him in reference to this case, which was



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then being considered by the jury, is sufficient to taint and cast suspicion on the verdict. Every verdict, especially in capital cases, should be above suspicion; not only must there be no tampering with the jury, but there must be no opportunity given for tampering. *Hare v. State*, 4 Howard, (Miss.) 187; 2 Graham & Waterman on New Trials, 315, 316, 317; *Knight v. Inhabitants*, 13 Mass. 220.

*J. L. Smith*, Attorney-General, for the State.

1. The application for a change of venue presented to the court below the determination of a question of fact. It passed upon it, its finding is conclusive. Sess. Acts 1873, p. 56; *State v. Taylor*, 64 Mo. 137.

2. The depositions of Russell and Hall detailed threats made by Norrick against Alexander, some two weeks prior to the homicide, which the court excluded. It does not appear that the threats were communicated to Alexander prior to the killing, and they were not part of the *res gestae*. *State v. Sloan*, 47 Mo. 604; *State v. Brown*, decided April Term, 1877. It will appear from an examination of the bill of exceptions that the court was most liberal in admitting evidence offered by the defendant, and he certainly has no just cause for complaint.

3. The defendant alleged, in his motion for a new trial, that the foreman of the jury had had a conversation with the judge of the court during the time they had the case under consideration, and that the remarks of the judge during that conversation, influenced the jury in making their verdict. The defendant filed affidavits in support of this allegation, and the State filed counter affidavits. The court below passed upon the question of fact which arose upon the affidavits, namely: whether the judge's remarks influenced the jury in agreeing to a verdict. There is evidence to sustain its finding, to-wit: Bryan's affidavit, who testified that he heard the juror say that he was not influenced by anything the judge said, and it is therefore con-

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clusive. The affidavit of Bennett, the juryman, does not enter into the consideration of this question. *State v. Branstetter*, 65 Mo. 149.

4. It is also insisted that there is no evidence upon which to base an instruction for manslaughter in the second degree. It appears from the evidence of Crook, that immediately after the shooting, he asked defendant whether he had killed Norrick, to which he answered he was afraid he had. The remark, taken together with the circumstances surrounding the killing, could well satisfy the jury that the defendant shot the deceased "without a design to effect death, in a heat of passion." 1 W. S., p. 447, § 11.

The evidence shows the defendant guilty of a cruel murder, and he ought to have suffered the penalty of the law for that crime; but as the jury saw fit, for what reason does not appear, to convict him of a less crime, he surely ought not now to complain.

HENRY, J.—The subject of the burden of proof in criminal cases, and the propriety of giving for the State such an instruction as the fifth, in the case at bar, was fully discussed in *The State v. Wingo*, decided at this term. It was there held that such an instruction was erroneous, but in that and the cases cited to sustain the views expressed in that opinion, there was no instruction declaring to the jury that if they had a reasonable doubt of the defendant's guilt, he was entitled to an acquittal; and while standing alone, the fifth instruction declaring that if defendant intentionally shot and killed Norrick with a shot gun, if the jury find that it was a deadly weapon, the law implies that the killing was malicious, and it devolves upon the defendant to show by the evidence to the reasonable satisfaction of the jury that the killing was justifiable, unless such justification appears from the evidence offered by the State, improperly casts the burden of proof upon the defendant, yet the fifteenth instruction, giving him the benefit of a reasonable doubt of his guilt upon the whole case, gives it

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a different meaning, or rather so qualifies it as to make it conform to what we regard as the law of the case. If the evidence adduced by the defendant to show justification or excuse, was sufficient to create in the minds of the jury a reasonable doubt of his guilt, then that is substantially by the fifteenth instruction declared to be proving the justification to the reasonable satisfaction of the jury. We would suggest that instead of declaring, as in the fifth instruction, the court, after stating as in that instruction the presumption of law from an intentional killing with a dangerous weapon, should instruct the jury that it devolves upon the defendant to adduce evidence to meet or repel that presumption. This, with a proper instruction as to a reasonable doubt, would clearly and fairly present the law to the jury.

In the sixteenth instruction the court declared that if defendant, without a design to effect death, in a heat of passion, did kill Norrick in a cruel and unusual manner, by shooting him with a shot-gun, they should find him guilty of manslaughter in the second degree. Frank Crook, a witness for the State, testified that defendant shot twice with a double barreled shot-gun; that defendant raised his gun and shot, and that deceased was about ten feet from Alexander. Eldridge Kyler, for the State, testified that defendant raised up his gun, deliberately took aim and fired. On that point there was no contradictory evidence. It was clearly shown that defendant, a few hours before the killing, emptied both barrels of the gun and loaded it with large shot, nor was there any evidence to contradict this. In his written opinion on the application of defendant to be admitted to bail, the judge who tried the cause correctly stated the law, as follows:

"A man is taken to intend that which he does, or which is the necessary or immediate consequence of his act. To illustrate, if a man within shooting distance of another raises his gun, takes aim and fires, and the ball inflicts a mortal wound from which death ensues, the fair

presumption is that he intended to kill his victim, and it so, the act is certainly murder, unless done in self-defense." The case supposed by him to illustrate the principle is the very case here, and it is a little remarkable that the court having so clear a view of the law, should have given the sixteenth instruction. That defendant intended to kill Norrick, is beyond a doubt. In the case of *The State v. Phillips*, 24 Mo. 475, Scott, J., delivering the opinion of the court, said: "It follows, then, that this was no case for an instruction as to the law of manslaughter in the second degree, for there can be no doubt, unless we stultify ourselves and refuse to permit our judgments to be influenced by considerations which govern all the rest of mankind, that Sullivan Phillips intended to kill Watson." Those remarks are equally applicable to this case, and it was error to give the sixteenth instruction. And here it may be observed that defendant was found guilty of manslaughter in the second degree, the very degree in regard to which the improper instruction was given, of which crime there was not a particle of evidence to warrant his conviction. He was either guilty of murder in one of the degrees of which an intention to kill is an element, or the killing was justifiable.

Appellant complains of the thirteenth instruction given for the State, which declared to the jury "that if they found from the evidence that defendant sustained a good character for peace and order previous to the alleged offense, such good character may be taken into consideration in determining the question of his guilt or innocence, but if they believe, from all other evidence, facts and circumstances, that defendant was guilty, his good character could not be looked to as ground of acquittal." The meaning of this instruction is somewhat obscure. If it mean that if, considering all the evidence, that of good character included, the jury believed him guilty, they should not acquit because he had a good character, it is correct; but if it intended to assert that if all the other evidence proved

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the defendant guilty, the evidence of good character was not to be considered, then it is faulty.

The instruction was wholly unnecessary, for no one fit to sit on a jury would suppose that good character entitles an accused to acquittal, when, all the evidence considered, he is proven guilty. All the evidence permitted to go to a jury by the court is for their consideration. The good character of the accused is an ingredient to be submitted to a jury like any other fact in the case. "I cannot, on principle," said Mr. Justice Patterson, in *U. S. v. Roudenbush*, 1 Baldwin 514, "make any distinction between evidence of facts and evidence of character. The latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty." The admissibility of this evidence has sometimes been restricted to doubtful cases, but in such cases the accused is entitled to an acquittal without regard to character and evidence of good character is offered to make a doubtful case. It is admissible in all cases, for it is not for the court to say that the case is a clear one. As the instruction is liable to misconstruction, we think it should be modified so as clearly to declare the principle which we think it was intended to announce, and which, as above indicated, is correct.

The court excluded evidence of threats made by deceased against defendant in the State of Kansas, about November 5th or 6th, preceding the homicide, and while defendant and deceased were driving the cattle to Missouri, in the division of which, on their arrival in Missouri, this difficulty originated. These threats were not communicated to defendant. There was evidence tending to show that deceased, at the time of the difficulty, which resulted in his death, first assaulted defendant with a knife. It is unlike the cases in this State in which it has been held that threats was inadmissible. In the *State v. Hays*, 23 Mo. 287, the defendant was the aggressor. No evidence tended to show that he was first assaulted by the deceased. So in the *State v. Taylor*, 64 Mo. 359. When there is evidence



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tending to show an assault first made by deceased, evidence of threats, made by the deceased, whether communicated to defendant or not, are admissible as bearing directly upon that important question, which the jury must determine before making their verdict

As was said by the court in the case of *Campbell v. The People*, 16 Ill. 17, "If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct toward the prisoner at the time of their meeting and of the affray. *Stokes v. People*, 53 N. Y. 164. To the same effect is the case of *The State v. Sloan*, 47 Mo. 604. Evidence of threats in such cases is not admissible to justify the killing, but as conducing to show that an assault was made by defendant, when there is other evidence tending to prove such assault. When there is no evidence that deceased made an assault, evidence of threats made by him is not admissible for any purpose. An idle threat, (and a threat which one does not attempt to carry out is to be regarded as an idle threat,) will not justify the threatened person in taking the life of him who made it. Hence, unless an attempt be made to execute the threat, evidence that it was made is wholly irrelevant and inadmissible.

The court committed no error in refusing the application for a change of venue. That a judge is prejudiced against a party cannot be predicated on a ruling in the cause against him. It was the duty of the court to decide upon defendant's application whether he should be admitted to bail, and in that preliminary proceeding his refusal to admit to bail is not to be regarded as prejudging his case. The refusing an application for a continuance might with equal propriety be held as proof that the judge was prejudiced against the party. Sustaining a demurrer to a plaintiff's petition could also be alleged as ground for questioning the impartiality of the court, if appellant's arguments be sound.

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After the jury retired to consider of their verdict, one of their number sent a note to Judge Kelley, the circuit judge who presided at the trial, with the following inquiry: "Will the law apply in this case as in dueling?" The judge wrote on the note: "see instructions 10, 11 and 12," and sent it by the bailiff to the jury. One of the jurors made an affidavit, on the part of defendant, in regard to a conversation had between him and the judge, while the jury were considering of their verdict, which we will not consider, since it is well settled that a juror will not be permitted to impeach the verdict of the jury by making an affidavit alleging their misconduct. But Geo. T. Bryan made an affidavit in which he stated that he heard a conversation between the judge and the juror Bennett, in which Judge Kelley asked Bennett to state what had transpired between them. Bennett said "that the judge asked him if they were likely to agree. Bennett told him they were not, that the jury stood too far apart, and the judge replied that he would like to have them agree upon a verdict if possible, and Bennett replied that there was no chance for agreeing upon a verdict except by a compromise." The judge made no reply. In his affidavit, Judge Kelley admits that he had a conversation with Bennett, in which the latter told him "that the jury could not make a verdict unless they could compromise," and that he made no reply to the juror. It is further shown by the affidavit of W. S. Greenlee, that the judge, while the jury were out, said he intended to send for the foreman, and learn how the jury stood. And William Deakins, one of the bailiffs, who had charge of the jury, states in his affidavit that Judge Kelley, before he had the conversation with Bennett, inquired of affiant how the jury stood, and that affiant told him three were for acquittal and nine for conviction.

There can be no question as to the impropriety of the conduct of the court. His written directions to the jury, "see instructions 10, 11 and 12;" his inquiries as to how

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the jury stood, and permitting a bailiff to tell him, without rebuke, that he had ascertained that three were for acquittal and nine for conviction; his silence, when the juror told him they could only agree by compromising, and all these private conversations held in the absence of the prisoner and his counsel, make out a case of misconduct on the part of the court, which it is to be hoped will not occur again. *State v. Patterson*, 45 Vt. 308. In *Sargent v. Roberts*, 1 Pick. 341, Parker, C. J., delivering the opinion of the court, said: "We are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court, and where practicable, in the presence of the counsel in the cause." In *Graham and Waterman on New Trials*, Vol. 2, p. 360, it is said that "the practice of the courts addressing private notes to the jury, cannot be sufficiently condemned." But it is unnecessary to cite authorities to prove a proposition which at once commends itself to our sense of justice and fairness. The jury are the triers of the facts, and the court has no more right to interfere with them while considering of their verdict, except in open court, to discharge them from time to time, or in the presence of the accused and his counsel, to instruct them as to the law of the case, than the jury have to invade the province of the court.

For the errors above indicated the judgment is reversed, and the cause remanded. All concur, NORTON, J., and HOUGH, J., in the result.

REVERSED.

THE STATE V. LEE, *Appellant*.

1. **Evidence:** CRIMINAL PRACTICE. The written report of the testimony of a witness taken before a committing magistrate, is not admissible as evidence on a criminal trial at which the witness is present and testifies, when not offered either to impeach the witness or to refresh his memory, but as independent testimony.
2. **Threats.** Evidence of threats made by the deceased against the prisoner, held to have been improperly excluded, (following *State v. Alexander*, *supra*, p. 148.)
3. **Practice:** ATTORNEY'S ARGUMENT. A court should not permit an attorney, either in a civil or criminal case, to state in his argument to the jury material facts of which no evidence has been given.

*Appeal from Webster Circuit Court.*—HON. R. W. FYAN,  
Judge.

At the trial defendant offered to prove by a witness that one Hayhurst, who was on friendly terms with Humphreys, in the November before Humphreys' death, came to the witness and told him that Humphreys said to him, Hayhurst, that if Dick did not quit talking about him, he, Humphreys, would bring grief, sorrow and desolation on the "hill." Defendant offered to prove that the Dick referred to was defendant, and that the hill referred to was the home of the witness, with whom defendant was living, and also to prove that Hayhurst told witness to caution defendant, and to tell defendant to be on his guard and on the lookout, and that the witness informed defendant of what Hayhurst had said, and warned defendant to be on the lookout for Humphreys, and to be very careful of Humphreys.

Defendant also offered to prove by another witness, that in November, 1874, he heard Humphreys say he would yet fix defendant, and that Humphreys, about the same time, threatened to kill defendant, and offered to prove that Humphreys entertained ill feelings against defendant up to his, deceased's, death, and to prove other threats of like char-

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acter made by Humphreys against defendant. But the court excluded the evidence.

*John O'Day* for appellant.

The court erred in excluding the threats made by deceased to kill defendant, and communicated to defendant through witnesses, Drury Lee and Hayhurst. These threats were not so remote as to be inadmissible as evidence. They were made in October, and homicide was in January following. The evidence is uncontradicted, that the ill-feeling continued down to the time of the death of deceased. There was no reconciliation. It is no objection that it was hearsay that Hayhurst informed the defendant's father and he, defendant. It matters not whether the threats were made or not, (although it is not denied but what they were). One object in proving communicated threats is to show the state of mind of the accused, and the apprehensions under which he acted. Threats produce the same effect on the mind of the accused, whether true or not, provided he believe his informant.

For the refusal of the court to permit defendant to prove the threats made by deceased to kill defendant, this case should be reversed. *Keener v. State*, 18 Ga. 194; *Stokes v. People*, 53 N. Y. 175; *Holler v. State*, 37 Ind. 57; *Dukes v. State*, 11 Ind. 557; *People v. Scoggins*, 37 Cal. 677; *Campbell v. People*, 16 Ill. 17; *People v. Arnold*, 15 Cal. 476; *Cotton v. State*, 31 Miss. 504; *Westey v. State*, 37 Miss. 327; *Riphey v. State*, 2 Head (Tenn.) 217; *Monroe v. State*, 5 Ga. 85; *Carico v. Commonwealth*, 7 Bush (Ky.) 124; *Franklin v. State*, 29 Ala. 14; *State v. Tackett*, 1 Hawks (N. C.) 210; *Hurd v. People*, 25 Mich. 405; *Pritchett v. State*, 22 Ala. 39; *State v. Elkins*, 63 Mo. 159.

The court should not have permitted the prosecuting attorney to go outside of the record in making the closing argument to the jury. *Loyd v. Hann. & St. Joe R. R.*, 53 Mo. 509.



*J. L. Smith, Attorney-General, for the State.*

The threats made by deceased to one McAdam against defendant in November, 1874, about three months before the killing, and not communicated to defendant prior to the shooting, were very properly excluded. *State v. Keene*, 50 Mo. 357; *State v. Sloan*, 47 Mo. 604.

HENRY, J.—The defendant was indicted for the murder of George Humphreys on the 20th of January, 1875, and was convicted of manslaughter in the second degree. On the trial of the cause, Mrs. Humphreys, widow of the deceased, was called as a witness for the State, and after she had testified, the State, against objection of defendant, was permitted to read as evidence to the jury her testimony taken before the justice of the peace on the preliminary trial of the accused. It certainly needs neither argument nor citation of authorities to show that such evidence was inadmissible, and upon what principle it was admitted we are at a loss to conjecture. It could not have been to impeach her, for she was the State's witness. It could not have been used to refresh her memory, for it was read to the jury, and this after she had concluded her testimony. A deposition in a civil suit would not have been admissible under such circumstances.

The evidence of threats made by deceased against the accused, was competent evidence, and the court erred in excluding it from the jury. *State v. Alexander*, p. 148, ante decided at this term, and cases there cited.

The prosecuting attorney, in his closing address to the jury, made the following remarks: "Defendant's attorneys know the law. Why did they not prove defendant's good character? He had not a good character, therefore they dare not attempt to prove defendant's good character. They could not do it, and dare not attempt to do it." A prosecuting attorney gets out of the line of his duty when, in his argument to the jury, he makes a statement of a ma-

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terial fact, not proved. The State would not have been allowed to prove the fact which he volunteered to state to the jury, unless the accused had introduced evidence to show that he bore a good character, and the court should not have permitted the remarks of the attorney to pass without a rebuke, which would have taken from them their sting. A proper rebuke would probably have cured the error. Such conduct of a prosecuting attorney was condemned in the case of *The State v. Kring*, 64 Mo. 591, and will be as often as it is properly brought to the notice of this court. It should not be tolerated in civil proceedings, and will not be in criminal cases. It is not necessary to place the reversal of the judgment herein on that ground, and therefore, we will not determine whether of itself, it would be a sufficient ground for reversal, but trust that we shall have no occasion again to consider the question.

We shall not notice the other errors complained of but for the error committed in permitting the State to supplement the evidence of Mrs. Humphreys, with her testimony taken before the committing magistrate, and in refusing to permit the accused to prove the threats made against him by the deceased; the judgment is reversed, and the cause remanded. All concur.

REVERSED.

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THE STATE, *Appellant*, v. VORBACK.

1. **Obtaining Goods under False Pretenses.** An indictment for obtaining goods under false pretenses, alleging several matters, one of which may not be in legal contemplation a false pretense, because it relates to something to be done in the future, is not vitiated thereby, if the others are such false pretenses as our statute contemplates.
2. —: **SUFFICIENT AVERMENT OF BELIEF IN THE FALSE PRETENSES.** An allegation in such an indictment that the person, to whom such

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false pretenses were made, believing the same, and being deceived thereby, was induced, by reason thereof, to deliver, &c., is sufficient averment that such person believed the false pretenses to be true.

*Appeal from Chariton Circuit Court.*—HON. G. D. BURGESS,  
Judge.

*J. L. Smith*, Attorney-General, for appellant.

A false pretense is defined to be a representation of some fact or circumstance calculated to mislead, which is not true. 2 Bish. Crim. Law. (5th Ed.,) Sec. 415.

So there need be only one false pretense, and although several be set out in the indictment, yet if any of them are proved, being such as amount in law to a false pretense, the indictment is sustained. 2 Bish. Crim. Law, sec. 418.

The pretense that the agent of the partnership had examined into the solvency of the defendant, and had satisfied himself of the same, such not being the case, was certainly calculated to mislead, and was of a sufficiently controlling character to cause the owners to part with the goods. As to the representation of owning a farm and property, see 2 Bish. Crim. Law, Sec. 444.

In Conger's case, 1 Wheeler's Crim. Cases, 450, representing that the defendant was a person of wealth and credit, was held a sufficient false pretense.

In *People v. Haynes*, 11 Wend. 557, Mr. Justice Nelson says, the statute extends to every case where a party has obtained money or goods by falsely representing himself to be in a situation in which he is not, or by falsely representing any occurrence that has not happened to which persons of ordinary caution might give credit.

So see *People v. Kendall*, 25 Wend. 399, where a minor representing himself to be a joint owner with his father of a number of cows and other stock on a neighboring farm, was held within the statute.

In *State v. Newell*, 1 Mo. 248, the defendant represented that he was the owner of four valuable slaves, when he

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was not, and our Supreme Court held this to be a false pretense and within the statute. 2 Bish. Crim. Law, Sec. 437; *State v. Pryor*, 30 Ind. 350.

*Pollard & Chapman*, and *S. C. Major, Jr.*, with *Devors & Winters* for respondent.

I. The indictment shows that a portion of the false pretenses were concerning some future thing the defendant was to do, viz: open a general store. Now, although there were other representations set up of things then in being, viz: his property and his bank account; yet, as the bill of exceptions fails to show the evidence, this court cannot determine whether Gaines, the person from whom the defendant obtained the goods, was actuated in delivering them by the one or the other representation, and the defendant is entitled to the benefit of the doubt, and as it is not a felony to obtain goods on a promise to do something in the future, the indictment is bad. *State v. Evers*, 49 Mo. 542; *Dillingham v. State*, 5 Ohio St. 282; *Commonwealth v. Drew*, 19 Pick. 185.

II. The indictment nowhere charges that Gaines believed the representations made by defendant, and it is therefore bad. *State v. Green*, 7 Wis. 676; *Commonwealth v. Strain*, 10 Met. 521; *State v. Bonnell*, 57 Mo. 395; Wharton's Am. Crim. Law, § 2128.

NORTON, J.—Defendant was indicted at the November term, 1873, of the Chariton county circuit court, for obtaining goods under false pretenses. He was tried at the November term, 1874, and convicted, and, on his motion, a new trial was awarded. He was again placed upon his trial at the November term, 1875, which resulted in his conviction, with punishment assessed to two years imprisonment in the penitentiary. A motion to arrest the judgment, on the ground that the indictment was insufficient, was sustained by the court, and from this judgment the State has appealed to this court.

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The indictment alleges in proper form that defendant made to Henry L. Gaines and James Louchein, who were partners in business, the following false representations "that he, the said Christian Vorback, was about to open a general store in the town of Dawn, in Livingston county, Missouri; that he, the said Christian Vorback, had, a short time previous thereto, met with one Samuel W. Spencer, who was the traveling salesman for the said Henry L. Gaines and James Louchein, and that Samuel had solicited his custom for said co-partnership; that he, the said Samuel Spencer, had examined into and had satisfied himself as to his, the said Christian Vorback's, solvency and ability to pay his debts, and that said Spencer had directed him, the said Vorback, to come down to Brunswick before purchasing elsewhere, and if the liquors, goods and prices therefor were not satisfactory to him, that he, the said Spencer, or the said firm of Henry L. Gaines, would pay his expenses both ways; also, that he, the said Vorback, owned a good farm and several buildings and houses in Livingston county, Missouri; that he, the said Vorback, was solvent and able to pay his debts and engagements, and that he did business and kept his bank account with a bank in the town of Chillicothe, Missouri, which he termed Dr. I. B. Bell's bank; that he had money on deposit at said bank; that he kept a bank account at said bank; that he kept a bank account at the bank known as the Chillicothe Savings Association, in Chillicothe, Missouri; that he had money on deposit at said bank, at said time, and kept money on deposit at all times at said bank."

One objection made to the indictment is, that a portion of the alleged false pretenses were made concerning some future thing the defendant was to do, viz: to open a general store in the town of Dawn. It is not urged by counsel for defendant that the other representations made by defendant, as to his being the owner of a farm in Livingston county, and other real estate, as to his having money on deposit in the banks of Chillicothe, were not



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such false pretenses as came within the meaning of the statute on which the indictment was framed. A false pretense is a representation of some fact or circumstance calculated to mislead, which is not true. (2 Bishop Crim. Law, Sec. 397.)

In the case of *The State v. Evers*, 49 Mo. 542, Judge Adams speaking for the court, says: "That the essence of the crime of obtaining money or property, by false pretenses is, that the false pretense should be of a past event, or of a fact having a present existence, and not of something to happen in the future, and that the prosecutor believed the pretense was true, and that, confiding in the truth of the pretense, and by reason thereof, he parted with his money or property."

Admitting that the alleged representation, made by defendant to Gaines, that he was about to open a general store in the county, was not in legal contemplation a false pretense, because it related to some thing to be done in the future, it by no means follows that the indictment was so vitiated thereby as to render it invalid. It may be treated either as surplusage or mere inducement to other allegations, which set up and charge such pretenses as are in law false pretenses. In an indictment for obtaining goods or money under false pretenses, when several such pretenses are alleged, the proof of any one will sustain the indictment. The rule, as laid down in 2 Bish. Crim. Law, Sec. 399, is stated thus: "There need be only one false pretense, and though several such pretenses are set out in an indictment, yet if any one of them is proved, being such as truly amounts in law to a false pretense, the indictment is sustained." That the other pretenses set out in the indictment, alleged to have been made by defendant, are such false pretenses as our statute contemplates, we have no doubt.

It is, however, said that the indictment is defective in not alleging that Gaines, to whom they were made believed them to be true. We think that this is sufficiently averred,

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the allegation being that "the said Gaines then and there believing the aforesaid false pretenses and representations, so made as aforesaid by said Vorback, and being deceived thereby, was induced, by reason of the false pretenses and representations, so made to deliver, &c." The allegation is made in substantial compliance with the rule as laid down in *State v. Evers, supra*.

We think the indictment was sufficient to support the judgment. Judgment reversed, and cause remanded.

REVERSED

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THE STATE V. JAEGER, *Appellant*.

1. **Assault to Commit Rape.** An indictment under section 32, p. 449, Wag. Stat., for an assault with intent to commit a rape upon a female child under the age of twelve years, need not contain the word "ravish."
2. **A verdict set aside as against the evidence.** While the Supreme Court will not lightly interfere with the verdict of a jury even in a criminal case, yet when it owes its birth and being to prejudice rather than to evidence, the court will refuse to sanction it. In the present case the court, after examining the evidence in detail, sets aside the verdict and reverses the judgment of conviction.
3. **Declarations by a Wife, NOT EVIDENCE AGAINST HER HUSBAND.** A proposal to have a criminal charge hushed up made by the wife of the accused, in his absence, is not admissible in evidence against him upon a trial for the alleged offense.

*Appeal from St. Francois Circuit Court.*—HON. LOUIS F. DINNING, Judge.

*John F. Bush and F. & E. L. Gottschalk for appellant.*

1. The indictment is insufficient. *State v. Mitchell*, 25 Mo. 420; *State v. Ball*, 27 Mo. 324; *State v. Byron*, 20 Mo. 210; *State v. Fulton*, 19 Mo. 680; *State v. Ross*, 25 Mo. 426; *Spratt v. State*, 8 Mo. 247.

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2. The verdict is not supported by the evidence, and the judgment should be reversed for this reason. *State v. Fritchler*, 54 Mo. 424.

3. The proposal of Mrs. Jaeger to have the matter hushed up, should not have been given in evidence; 1st, because it was mere hearsay; 2nd, because a wife's declarations are inadmissible against her husband, on the same grounds of domestic policy, which make her testimony against him inadmissible. *Roscoe Crim. Ev.*, (Am. Ed.,) 113; 1 *Phil. on Ev.*, 96; *Burgen v. Tribble*, 2 Dana 383; *Smith v. Scudder*, 11 Serg. & R. 325; *Park v. Hopkins*, 2 Bailey 408; *Comm. v. Briggs*, 5 Pick. 429.

*J. L. Smith*, Attorney-General, for the State.

1. The indictment is certainly good. *Wag. Stat.*, p. 449, § 32; p. 448, § 23.

2. The evidence as to Mrs. Jaeger's proposal could not be excluded because of the rule in reference to compromises, as the rule does not apply to criminal prosecution—only to civil ones. It was not hearsay, as the wife herself being inadmissible as a witness, there could be no other mode of proving the conversation. If it was irrelevant, it did the defendant no harm. And, again, the conversation between the wife of defendant and the mother of the child, was brought out by defendant himself, and the plaintiff was pursuing a legitimate cross-examination when he elicited the matters of which defendant now complains. Even if the evidence was incompetent, still this court will not reverse therefor, as the evidence proved nothing, and could not have produced a different verdict. *Clark v. People*, 31 Ill. 479.

3. This court will not interfere with verdicts in criminal cases, unless the evidence is so strong against the verdict as to show that it is manifestly wrong and unjust. *State v. Connell*, 49 Mo. 282.

4. To disturb the verdict for want of evidence the

failure must be so great as to leave the necessary inference that the jury acted from prejudice or partiality. *State v. Cook*, 58 Mo. 546

*F. M. Carter*, Prosecuting Attorney of St. Francois county, also for the State.

The evidence on the re-examination in chief as to the conversation between the mother of the injured party and wife of defendant, as to a proposition to compromise, made by the latter to the former, was elicited in explanation of a question asked by defendant, as to whether the mother of the girl did, or did not, propose to compromise the alleged offense for the sum of one thousand dollars, and was a part of the conversation in which the thousand dollars was mentioned, and was first drawn out by defendant's counsel, and under the circumstances could not prejudice the rights of the defendant, but it was necessary that such conversation in relation to the alleged offer of compromise should be fully detailed to the jury in order that they might fully understand the issues.

SHERWOOD, C. J.—The defendant indicted, tried and convicted, under section 32, (p. 449, 1 W. S.,) for an assault upon a little girl between 9 and 10 years of age, with intent, &c., and sentenced to imprisonment in the county jail for six months, and to the payment of a fine of \$500, appeals to this court.

Under the authority of *McComas v. The State*, (11 Mo. 117), we must hold the indictment, although not containing the word "ravish," sufficient. Thus, conceding the sufficiency of the indictment we are led to the trial and the incidents.

It is, indeed, a very sad commentary on human nature, that accusations like the present, are ever founded in fact; and it is an equally melancholy reflection that but too frequently, charges of this sort result alone from the promptings of a mendacious and malevolent spirit fortuit-

ously furnished with some slight circumstance sufficing to give verisimilitude to some artfully woven and damning story. The judicial annals abound with instances where the sheerest fabrications respecting the offense here charged, have been made to assume and wear the hue and complexion of absolute verity. Courts and juries, hurried away by the mere atrocity of the charge and heinousness of the alleged crime, forget, in what they verily regard as a just indignation, to patiently observe those prudent precautions, in weighing and scrutinizing the testimony adduced in support of the grievous charge, in the manner tested and approved in investigations of this nature, by the wisdom of ages. In this connection the warning of Lord Hale, respecting the consummated crime, should be borne in perpetual remembrance, as equally pertinent regarding assaults with intent to commit the crime: "that it is an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent."

The assault is said to have occurred in a bakery, almost at the hour of high noon, on a frequented street of a town possessing a population of some five hundred inhabitants, augmented by a force of laborers employed at a "cut," but a few minutes walk from the scene of the alleged offense. The child relates that on the morning of the alleged occurrence, her mother sent her to defendant's bakery for bread; that upon making her errand known, instead of complying with her request, he got up, locked the front door, seized her by the hand, took indecent liberties with, and made improper proposals to her, dragged her behind the counter, threw her on the floor, exposed his person and made the assault with which he is charged, but upon her crying, he asked her if she did so because the floor was hard for her head, and if she wanted a pillow; got up, told the child to stay till he came back; went through a side door through the back shop to the front door of the dwelling house, which door was some twenty yards distant, went up stairs where the boarders slept, got the pillow, and



was returning with it, when, having seized the bread (three loaves, which she says she bought, although defendant never gave it to her, and which she says was not on the table when she went in, and which she says defendant never put there prior to taking her behind the counter) she unbolted the front door and went out to the yard gate, just as defendant returned through the back door with a gray pillow, opened the door, looked behind the counter, and exclaimed with an oath, "She's gone!" She also states, and reiterates the statement, that she was at the bakery two hours; that Jaeger was not gone for the pillow more than a minute; that she ran home, reached there as the whistle blew, and told her mother what had happened.

Aside from the intrinsic improbability of this story, that a brutal assault would have been discontinued on so slight and singular a pretext, there are greater obstacles still to be overcome, before the story of the child can be believed. She is flatly contradicted by Margaret Kober, who states she saw the child, on the morning in question, come into the bakery, buy bread of Jaeger, and go out of the yard gate; that witness was cooking for defendant's family, and went into the bakery four times that morning, the last time to get bread and to call defendant to dinner, at which time witness saw the child come into the gate, and into the front door, as witness came into the back door, and when witness went behind the counter where Jaeger was, she heard the child ask him for bread; which, when he had given her, he, in a moment thereafter, came out to dinner, and that this was but a few minutes before 12 o'clock, as shortly thereafter, the whistle blew. In addition to that, if the diagram furnished by the witness Thompson be correct, it was physically impossible for the child, standing at the yard gate, to see Jaeger look behind the counter, and immediately on coming into the back door he would have seen the front door open, and had no necessity for looking behind the counter. The child also testifies that the back door of the bakery, the one leading

into the bake-shop, was shut that morning; in this, she is contradicted by Bluton, who was the baker of the defendant, and remained in the bake-shop all the morning, except when a few moments absent, about ten minutes before the whistle blew, seated on a bench in front of the dwelling house—which was separated from the bake-shop by a space of some ten feet—and that Bluton was seated on the bench at the time just stated, is shown by the testimony of Lucius—who, driving up to the dwelling house on some errand, saw Bluton there, and saw Jaeger also, who came out of the dwelling house, received the message, and sold witness a pie. The message to Jaeger required the taking of bread by him to Bismarck that afternoon; and he went there with Margaret Kober, that afternoon, as shown directly by her testimony, and indirectly by that of Mrs. Wahl, the child's mother. This portion of the testimony relating to the trip to Bismarck, is only important, as identifying the day. Nor are these all the impediments in the way of giving credence to the child's story. Gertrude Brandt, another servant of defendant, was washing clothes all day, and especially from 8 o'clock in the morning until 12 o'clock, in the narrow alley between the bake-shop and the dwelling house, about twenty feet from the door of the dwelling house, which fronted the back door of the bake-shop, and only some twenty-one feet from the south end of the counter, behind which the assault is said to have occurred. And that Gertrude Brandt was washing in the yard that day, and shortly after the alleged assault, is shown by Mrs. Wahl's own testimony. Besides, Mrs. Jaeger, having a sore foot, was seated in the dwelling house door, which fronted the back door of the bake-shop, knitting all the time between the hours of 11 and 12 o'clock, on the morning the assault is said to have occurred. This is shown by the testimony of Margaret Kober and of Gertrude Brandt, whose washtub faced that door; and that she was washing there that day is corroborated by Margaret Kober's testimony, which also confirms that of Lucius

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as to seeing Bluton seated on the bench at the time indicated. Nor is this all; it is shown by Gertrude Brandt that Jaeger's five children, the oldest some 18 years of age, were all at home that day, and by Margaret Kober, whose duties as cook required attention to the time, that the family usually sat down to dinner at fifteen minutes to 12 o'clock, and the family were still at the table when 12 o'clock arrived or the whistle blew. The child is also contradicted by both Gertrude Brandt and Margaret Kober, as to Mrs. Jaeger being seated in the dwelling house door, facing the back door of the bake-shop. She also contradicts and is contradicted by her own mother; the former swearing that a conversation occurred the previous night as to what she was to swear at the trial; the mother swearing exactly the reverse.

In addition to that, the animus of the mother toward the defendant, is shown by her saying, "that Jaeger had it too good," i. e., was too prosperous. And, if Christ. Hacke is to be believed, (and the prosecution did not succeed in its attack on his reputation) Mrs. Wahl, on the day of the preliminary examination, was heard threatening the child in case she failed to testify in a certain way. When we reflect on the foregoing circumstances, we are constrained to wonder that a jury could be found, who, regarding the defendant's guilt as established beyond a reasonable doubt, would find a verdict against him. And while this court, it is true, will not lightly interfere with the verdicts of juries, even in criminal cases; when such verdicts owe their birth and being to prejudice rather than to evidence, we will not fail to refuse our sanction to such unwarrantable results. (*State v. Packwood*, 26 Mo. 340; *State v. Burgdorf*, 53 Mo. 65; *State v. Mansfield*, 41 Mo. 470; *State v. Daubert*, 42 Mo. 238; *State v. Brosius*, 39 Mo. 534.)

So far as concerns the instructions given and refused, we have found nothing worthy of special comment, in view of the insufficiency of the evidence. There is, however, another point to which we desire to advert before closing

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consideration of the case. It is this: Mrs. Wahl was allowed, against the objection of defendant, to testify in regard to his wife having called on her the morning following the alleged assault, and, in the absence of defendant, making proposals to have "the matter hushed up." Upon what principle or rule of evidence such statements were admitted, neither the horn-books of the profession, nor the reports of adjudged cases, furnish either illustration or example. It is growing excessively monotonous to have to reverse judgments in criminal cases for errors such as these; errors so palpable that it would really seem that the bestowal of even cursory attention on the rudimentary principles of evidence would effectually prevent. (*State v. Arnold*, 55 Mo 89.) And it will not do to say that the testimony was merely irrelevant, and consequently did the defendant no harm. It went to the jury against the objection of the defendant, accompanied by the express approval of the court; and no doubt it was received and regarded by the jury in the same light as if a direct proposal of compromise from the defendant himself. If the minds of the jury, at that juncture, were still tremulous with indecision between the innocence and the guilt of the prisoner, the reception of such testimony was sufficient to turn the scale against him. And the courts will hesitate long before they will say that the violation of a plain rule of evidence, as in the present instance, did not operate to the prejudice of the accused. (*State v. Holme*, 54 Mo. 160.)

For the error just mentioned, and for the failure to set aside the verdict, because of the insufficiency of the evidence, we reverse the judgment and remand the cause. All concur, except NAPTON, J., who expresses no opinion.

REVERSED.

THE STATE V. WINGO, *Appellant*.

1. **Criminal Law: REASONABLE DOUBT: MURDER.** In a criminal prosecution the State must establish the guilt of the accused beyond a reasonable doubt, upon a view of the whole evidence. The case is not divided into two parts, one of guilt asserted by the State, the other of innocence asserted by the accused. There is no shifting of the burden of proof; it remains upon the State throughout the trial. An instruction is, therefore, erroneous which declares that if defendant shot and killed the deceased, the law presumes that it is murder in the second degree, in the absence of proof to the contrary; and it devolves upon the defendant to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense.

Such an instruction is especially objectionable when the court fails to give the jury a proper instruction as to reasonable doubt.

2. **Murder.** When the evidence for the State, upon a trial for murder, raises the question whether defendant was acting in self-defense, when he committed the homicide, it is error to give the jury an unqualified instruction that if he willfully shot and killed deceased, they should find him guilty of murder in the second degree.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADUS,  
Judge.

*Luther T. Collier* for appellant.

I. The first instruction, given at the instance of the State, is erroneous, for the following reasons:

1. Because it ignores the question of malice. This is an essential element in the crime of murder in the second degree, and while it may be inferred from other facts proved in the case, still it is an issue that must be passed upon by the jury. *State v. Joeckel*, 44 Mo. 234; *State v. Philips et al.*, 24 Mo. 485.

2. Because the testimony as given by the State develops facts tending to excuse, justify or extenuate the offense charged against the accused, and said instruction withdraws from the jury the consideration of such facts, and shifts the burden of proof from the State to the defendant. *State v. Williamson*, 16 Mo. 396; *State v. Cushing*, 29



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Mo. 216; *State v. Murphy*, 11 Am. Rep. 124; *State v. Felter*, 32 Iowa 49; *State v. Patterson*, 12 Am. Rep. 200; *State v. Patterson*, 45 Vt. 308; *Stokes v. The People*, 53 N. Y. 164; *Stokes v. The People*, 13 Am. 492; *Cone v. York*, 9 Met. 116; *Cone v. Webster*, 5 Cush. 305; Wharton's Am. Crim. Law, Sec. 707; *State v. Holme*, 54 Mo. 163.

II. The third instruction given for the State is wrong, because,

It wrongfully changes the burden of proof.

2. It deprives the accused of the benefit of any reasonable doubt touching his guilt, and arising from all the evidence in the cause. 13 Am. Rep. 492; *Stokes v. The People*, 53 N. Y. 164; *Maher v. The People*, 10 Mich. 212; *State v. Murphy*, 33 Iowa 270; *State v. Porter*, 34 Iowa 131.

3. It assumes that the bare act of killing is murder in the second degree, without regard to the facts and circumstances, (in evidence by the State) as to how such killing took place. *State v. Underwood*, 57 Mo. 49.

*J. L. Smith*, Attorney-General, for the State.

After a careful examination of the transcript, I confess that it is impossible for me to say of what the appellant could possibly complain in the action of the court below. The principles enunciated in the instructions on the part of the State are too well settled to require further notice than a citation of some of the rulings of this court thereon. *State v. Joeckel*, 44 Mo. 234; *State v. Lane*, 64 Mo. 319; *State v. Hundley*, 46 Mo. 414; *State v. Hays*, 23 Mo. 287; *State v. Underwood*, 57 Mo. 40; *State v. Starr*, 38 Mo. 270.

HENRY, J.—That it devolves upon the State to establish by evidence the guilt of the accused beyond a reasonable doubt, will not be controverted. The defendant, by his plea of not guilty, puts in issue every material allegation in the indictment. He is not required to plead specially any matter of justification or excuse. The case is not divided into two parts, one of guilt, asserted by the State, the other of

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innocence, asserted by the accused. He does not plead affirmatively that he is innocent, but negatively that he is not guilty; and on that issue, and that alone, the jury are to try the case throughout.

There is no shifting of the burden of proof. It remains upon the State throughout the trial. The evidence may shift from one side to the other. The State may establish such facts as must result in a conviction, unless the presumption they raise be met by evidence, but still the burden of proof is on the State to establish the guilt of the accused beyond a reasonable doubt. *Ogletree v. State*, 28 Ala. 693; *Meady v. The State*, 5 Iowa 433; *Com. v. McKie*, 1 Gray 61; *State v. Flye*, 26 Me. 316; Wharton's Am. Crim. Law, Sec. 707.

In Stokes' case 53 N. Y. 164, Rapallo, J., said: "The jury must be satisfied on the whole evidence of the guilt of the accused; and it is clear error to charge them when the prosecution has made out a *prima facie* case, and evidence has been introduced tending to show a defense, that they must convict unless they are satisfied of the truth of the defense. Such a charge throws the burden of proof upon the prisoner, and subjects him to conviction though the evidence on his part may have created a reasonable doubt of his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are fully satisfied that he has proved his innocence."

Wharton, in his work on American Criminal Law, section 707, says: "The principle may be broadly stated that when the defendant relies on no separate, distinct and independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof continues throughout with the prosecution."

The same doctrine is held in Massachusetts in all criminal cases, except homicides. In *Com. v. McKie*, 1

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Gray 61, it is distinctly and clearly announced, and the distinction betwixt cases of homicide and other criminal cases recognized. No such distinction, however, has obtained in this State, and there can be no good reason why it should prevail anywhere. A distinction between felonies and misdemeanors throwing the burden of proof on a defendant indicted for a misdemeanor, to establish his justification or excuse, after the State has made a *prima facie* case against him, would certainly be more reasonable and more in consonance with the merciful maxims in favor of life and liberty than that which is recognized in Massachusetts. The higher the grade of the offense the stronger the reason why the burden of proof should remain upon the State throughout.

In the *Com. v. York*, 9 Met. 122, *Com. v. Knapp*, 10 Pick. 484, and *Com. v. Webster*, 5 Cush. 296, it was held that when one kills another, it devolves upon the defendant, when the State has proved that he was the slayer, to establish circumstances of justification by such evidence as will outweigh or overbalance the evidence which it is brought to control, while in all other criminal cases a different rule is applied. It is conceded in that case, and in fact all the cases which we have examined, that the burden is not shifted by proof of a voluntary killing when there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstances attending the homicide. As stated by Shaw, C. J., in York's case, "when the fact of voluntary homicide is shown, and this is not accompanied with any fact of excuse or extenuation, malice is inferred from the act; this is a fact which may be controlled by proof, but the proof of it lies on the defendant, and if not so proved, it cannot be taken into judicial consideration." In *Com. v. McKie*, *supra*, Bigelow, J., delivering the opinion of the court, observed: "But can the government in such a case, on proving simply the injury to the person, rest their case, and call on defendant to assume the burden of proof and sat-

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isfy the jury that it was accidental, or else submit to a conviction? If so, then a criminal charge can always be shown by proving part of a transaction, and the burden of proof can be shifted upon the defendant by a careful management of the case on the part of the government, so as to withhold that part of the proof which may bear in his favor." That was an indictment against McKie for assault and battery, and the observations and reasoning of the learned Judge would apply with equal force to a case of homicide where the distinction in that respect, between cases of homicide and other criminal cases does not prevail as in Massachusetts.

The State's interest is not promoted by the conviction and punishment of any of her citizens for crimes of which they are innocent, and it is as much the duty of those who represent her to protect the innocent as to convict the guilty. If the Massachusetts doctrine in regard to homicide be correct, the prosecuting attorney has but to introduce those witnesses who saw nothing to justify the defendant, to throw the burden of proving his innocence upon the defendant, and impose upon him the duty of proving by a preponderance of evidence, as in civil cases, the facts he relies upon for justification or excuse. This is "the careful management of a case on the part of the government" by which the burden is shifted in Massachusetts in prosecutions for homicide.

The defendant is entitled to the benefit of a reasonable doubt of his guilt on the whole case, not only as to whether the case made by the State is open to reasonable doubt, but if the evidence for the State be clear, and, in the absence of other evidence, conclusive, still if the evidence adduced by the accused, whether it establishes the facts relied upon by a preponderance of evidence or not, creates a reasonable doubt of his guilt in the minds of the jury, he is entitled to an acquittal. At no stage of the trial does he stand asserting his innocence. The authorities for this proposition are numerous. All the Massachusetts

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cases before cited, except those which were prosecutions for homicides, fully sustain it. To the same effect is *Twedy v. The State*, 5 Iowa 433; *State v. Murphy*, 33 Iowa 270; 32 Iowa 52; *People v. Stokes*, 53 N. Y. 165; *State v. Merrick*, 19 Me. 400; *State v. Flye*, 26 Me. 13; *Chaffee v. U. S.*, 18 Wallace 507; Wharton's Am. Crim. Law, Sec. 707; *Com. v. Kimball*, 24 Pick. 373; *Com. v. Dana*, 2 Met. 340; *Com. v. Bradford*, 9 Met. 270.

In the case at bar defendant was indicted for murder, charged with having killed one Gamble, and the evidence was that on the 10th of September, 1876, the defendant and one Caldwell walked to Grand river from Spring Hill and returned that evening. They had both been drinking, and defendant was so drunk that Caldwell left him on the road side and proceeded home. He reached home about dark, and deceased, who had been there for him in his absence, returned. They had some conversation in regard to the employment of Caldwell by deceased to work for him, when Caldwell said he had left defendant on the road side, and had promised to return for him. Deceased said he would accompany him. Caldwell walked and deceased rode his horse. When they got to defendant, deceased dismounted and let defendant ride. They returned to Spring Hill and went to Caldwell's house. Defendant said he would lie down on the lounge. He had his gun with him and placed it near the head of the bed. Caldwell and deceased were outside, sitting on a porch which extended nearly across the house. After defendant had been lying down about fifteen minutes, he got up, got his gun, went to the door with the breech of the gun raised as high as his head, and said to Caldwell and deceased, "God damn you, if you don't come into the house and quit talking about me, I will mash you both into the earth." The deceased said he allowed no man to draw a gun on him, "and fired upon defendant, shooting him in his privates." Gamble was sitting when he fired, and immediately defendant shot and killed him with his gun. There was no testimony



showing that defendant made any attempt to strike Caldwell or deceased with the gun.

Among other instructions, the court gave the following:

1. That if in the month of September, 1876, in Livingston county, the defendant willfully shot and killed Henry Gamble, the jury will find him guilty of murder in the second degree and assess his punishment, &c.

3. If defendant shot and killed Gamble, the law presumes that it is murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant, Wingo, to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense.

The instructions for the accused were on the theory of self-defense. There was an instruction declaring what was a reasonable doubt, but no instruction that if the jury had such doubt of defendant's guilt, he was entitled to an acquittal. Applying as tests, the principles above stated, are those instructions such as should have been given? We are not inclined to seek for unsubstantial, metaphysical subtleties, or to indulge in hypercriticism of instructions or rulings of the trial courts to screen offenders from merited punishment, but there are certain great principles imbedded in American criminal jurisprudence which secure a fair trial to citizens accused of crime, and which, however often invoked successfully to procure the acquittal of the guilty, cannot be ignored without imperiling the most sacred rights of the citizen. One of them requires that the State shall establish the guilt of the accused beyond a reasonable doubt. The third instruction declares that if the State prove that defendant killed Gamble, it devolves upon defendant to show, from the evidence, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense. What is its meaning? "It lieth upon the party indicted to prove the sudden quarrel." "Must prove his case to the satisfaction of

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the jury." "It is incumbent on the prisoner to make out, &c." "The circumstances are to be satisfactorily proved by the prisoner." "These various expressions," says Shaw, Ch. J., in York's case, "we consider as meaning the same thing." Again he says, "it is hardly necessary to cite authorities to the very familiar principle that when a fact is to be proved, it must be by evidence sufficient to lead a jury to believe it, and that for this purpose it must outweigh or overbalance the evidence which it is brought to control."

We think that he was correct in stating that these various expressions mean the same thing, and, if so, the third instruction shifts the burden upon defendant to prove his innocence. It must be borne in mind that a declaration that if the State has made out a *prima facie* case, it devolves upon the defendant to adduce evidence to repel it, is very different in substance and effect from one which declares that he shall establish the facts upon which he relies as a justification to the satisfaction of the jury—or by a preponderance of evidence, for they are identical in meaning. The difference is as to the amount of evidence. We are not without authority in support of this proposition.

In the *Com. v. McKie, supra*, the defendant was indicted for an assault and battery, and the trial court instructed the jury "that the burden of proof was on the government to satisfy the jury that defendant did strike Eaton with a dangerous weapon, in the manner alleged in the indictment, and that if the government failed in this, they should acquit the prisoner; but that if this was proved beyond a reasonable doubt, the burden was then on the defendant to satisfy the jury of the justification, to-wit: the spitting in the face of the defendant, which was the only justification contended for or relied upon, and if the jury were not satisfied of the fact relied upon for a justification, but were satisfied that the government had made out the allegation

in the indictment, their verdict must be against the defendant."

The Supreme Court of Massachusetts held this an erroneous instruction, and Bigelow, J., speaking for the court, said: "However the rule may be in cases where the defendant sets up in answer to a criminal charge, some separate, distinct and independent fact or series of facts, not immediately connected with and growing out of the transaction on which the criminal charge is founded, there can be no doubt that in a case like the present, the burden of proof remains on the government throughout to satisfy the jury of the guilt of the defendant." In other words the court held that the instruction shifted the burden of proof on the defendant, and was, for that reason, erroneous.

In the *State v. Porter*, 34 Iowa 139, the jury was instructed as follows: "If you find from the evidence that the defendant killed or caused the death of John Porter, and if you further find that he was acting in self-defense in so doing, it will be your duty to acquit him; or if you find that Porter attacked the defendant, and that the defendant only used such force as was necessary to repel the assault, he would not be guilty as charged, even if death did result therefrom. If, however, you find that the defendant inflicted the blow upon the deceased that caused his death, then the burden of proof is upon the defendant to show that he did it in self-defense." Day, J., speaking for the court, said: "The instruction is clearly erroneous. Proof is the result of evidence. No fact can legally be said to be proved unless it is established by at least a preponderance of evidence. The party upon whom rests the burden of proof must establish the fact respecting which the burden is cast upon him, by at least a preponderance of evidence."

Again, "Under the rule laid down, the defendant must establish, by a preponderance of evidence, that he acted in self-defense, or the jury would be required to find

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him guilty; whereas, he is entitled to an acquittal if he shows by the facts attending the commission of the offense, proved either by himself or the State, that there is reasonable doubt that his act was willful. The rule is different where the matter of defense is wholly disconnected from the body of the offense."

In the *State v. Merrick*, 19 Me. 401, Weston, J., speaking for the court, said: "When, by opposing testimony, reasonable doubt is thrown upon a *prima facie* case of guilt it can no longer be said that the party accused is proved guilty beyond a reasonable doubt. The jury are to judge upon the effect of the testimony taken together. It was in our judgment, too strong to instruct the jury that they must convict the accused, unless he had proved, to their reasonable satisfaction, that he came by the sheep otherwise than by stealing."

In the *State v. Flye*, 26 Maine 312, defendant was indicted for forging an order, and the court instructed the jury "that if it was proved that the order came into the hands of defendant unaltered, and came out of his hands altered, the burthen was on the defendant to prove that he did not alter it." The court said, Tenney, J.: "By the instruction, the fact of the alteration between the time when the order came into the defendant's hands and when it came out, threw a burthen on to the defendant. What was that burthen? It was not merely to give such an explanation as would raise a reasonable doubt of his guilt, or even to render it probable that he did not alter it; but to establish as a fact, a truth, a reality, that he did not do it." The court held that the instruction was erroneous, and said: "The prosecuting party is bound to make out his case, in civil proceedings, to the satisfaction of the jury and in criminal, beyond a reasonable doubt. The burthen of proof does not shift from the party upon whom it was originally thrown, upon the production of evidence by him sufficient to make out a *prima facie* case. But when the other party relies upon facts to establish another and

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distinct proposition, without attempting to impugn the truth of the evidence against him, it is otherwise. If the result of the case depends upon the establishment of the proposition of the one on whom the burthen was first cast, the burthen remains with him throughout, though the weight of evidence may have shifted from one side to the other, according as each may have adduced fresh proof." Again, "There is a wide distinction between a requirement in a criminal prosecution that the accused shall prove his innocence where a presumption is raised against him, and the necessity of explaining in some degree the fact on which that presumption rests."

Here it may be remarked that the State never makes other than *prima facie* case before the evidence for the defense is heard. No matter how positive and direct the testimony may be, it is still but a *prima facie* case.

*Chaffee v. United States*, 18 Wallace 517, was an action of debt for a statutory penalty, and Field, J., delivering the opinion of court, commenting upon the instruction given, to which exceptions were taken, said: "The purport of all this was to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet, if the government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury in substance, that the government need only prove that the defendant was presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not, they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The instruction sets at



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naught established principles, and justifies the criticism of counsel, that it substantially withdrew from defendant their constitutional right to a trial by jury, and converted what at law was intended for their protection, the right to refuse to testify, into the machinery for their sure destruction." He cites in support of the views of the court, *Doty v. The State*, 7 Blackford 427; *State v. Flye*, 26 Me. 312; *Com. v. McKie*, 1 Gray 61.

The instructions condemned in the several cases above cited, are in substance identical with the third instruction for the State in the case at bar, and we think the court erred in giving it, especially as there was no instruction declaring to the jury that if they had a reasonable doubt of his guilt, on the whole case, they should acquit the prisoner.

The first instruction should have been qualified. The evidence for the State raised a question as to whether the defendant made an assault upon deceased, which justified the deceased in shooting him, and whether defendant was acting in self-defense when he shot the deceased; and all the cases hold that when that is so, an unqualified instruction, such as we are considering, should not be given.

The judgment is reversed and the cause remanded. All concur. NORTON, J., and HOUGH, J., concur in the result.

REVERSED.

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STATE V. DANIELS, *Appellant*.

1. **Courts, Inferior.** A court is inferior to another under whose supervisory or appellate control it is placed; a court of limited jurisdiction is also inferior to a court of general jurisdiction. Limited jurisdiction extends only to certain specified causes; general, to a great variety of matters.
2. —: CRIMINAL COURT OF THE SIXTH JUDICIAL CIRCUIT AND THE COUNTY OF JOHNSON, AN INFERIOR AND CONSTITUTIONAL COURT. Sec.

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13, Art. 6, of the constitution of 1865, declared "that the circuit court shall have jurisdiction over all criminal cases, which shall not otherwise be provided for, by law." *Held*, that this section, by necessary implication, authorized the legislature to provide by law for taking from circuit courts jurisdiction over all criminal matters. *Held*, also, that Sec. 4, of the Schedule of the constitution of 1875, providing "that all courts organized and existing under the laws of the State, and not specially provided for in this constitution, shall continue to exist until otherwise provided for by law," must be regarded, till other provision is made, as imparting vitality to the criminal court of the Sixth Judicial Circuit and Johnson county, which was organized and existing at the time of the adoption of the constitution of 1875. *Held*, also, that Sec. 23, Art. 6, of the constitution of 1875, providing that circuit courts shall exercise superintending control over criminal courts, . \* \* in each county in their respective circuits, places the criminal court in question in the class of inferior courts which the General Assembly may establish in virtue of Sec. 1, Art. 6, of the constitution of 1865. *Held*, also, that the act of 1875, creating the court in question, was not obnoxious to that provision of the constitution of 1865, which prohibits the enactment of a special law when a general law could be made applicable; so held, on the ground that it was for the legislature to determine whether a necessity existed for this criminal judicial circuit, and did not exist for such circuits in other portions of the State.

3. ——— : CHANGE OF VENUE FROM. In the act establishing this court, it was provided that, "In all cases where a change of venue is granted from said criminal court on the ground of prejudice, or other disqualification of the judge of said court, the same shall be certified to the circuit court of the county in which said cause shall be pending," but there was in said act this further provision, "that all acts now in force, or that may hereafter be made, regulating the criminal practice and proceedings in courts of record, \* \* \* shall govern the proceedings in said criminal court so far as the same may be applicable;" and by a subsequent act it was declared, "that hereafter no change of venue shall be awarded in any indictment or criminal prosecution in any circuit or criminal court in either of the following cases," the prejudice of the judge being one of the specified causes, and it was further declared that whenever in any cause an application should be made for a change of venue for any of the specified causes, the judge should make an order for the election of a special judge to try the case; *Held*, that the court was powerless to make any other order than one for the election of a special judge to try the cause.
4. ——— : WHAT, IT IS NOT NECESSARY THAT ITS RECORD SHOULD SHOW,

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Where the record of an inferior court, which is, however, a court of record, and exercises its jurisdiction according to the course of the common law, recites that members of the bar, exceeding three in number, voted at the election of a special judge, the further recital that such members of the bar were duly licensed and enrolled is not required.

5. **Indictment:** OBJECTION TO, BASED UPON CAPTION OF. An objection to an indictment that it purports to have been found in a court which never existed, based solely upon the name given to the court in the caption of the indictment, will not be regarded, where the record shows that the indictment was returned to a court of whose existence judicial notice can be taken.
6. **Practice—Supreme Court.** An objection, where there is nothing either in the record proper, or in the bill of exceptions, upon which to base it, cannot be considered by this court.
7. **Change of Venue.** The court to which a change of venue is granted, obtains jurisdiction of the cause when the order granting the same is made; and the direction to the clerk, contained in the order, that he transmit a transcript of the record improperly designating the court, to which the venue is ordered, will be rejected as surplusage.

*Appeal from the Criminal Court of the Sixth Judicial Circuit and the County of Johnson, in and for Pettis County.—*

The case was tried before A. W. ROGERS, Esq., sitting as Special Judge.

*J. LaDue* for appellant.

1. The act of the General Assembly of the State of Missouri, (Sess. Acts 1875, p. 42,) creating the criminal court of the Sixth Judicial Circuit, and the county of Johnson, is claimed to be unconstitutional and void, for the reason that it is not an inferior tribunal within the meaning of Sec. 1, Art. 6, of the Constitution of Missouri of 1865, under which said act was passed. *In re Booth & Rycraft*, 3 Wis. 180; *McCormick v. Sullivan*, 10 Wheat. 199; 5 Cranch 185; *Meyers v. Kalkman*, 6 Cal. 582; 18 Ills. 331.

2. The court, in which this case was tried below, or the act creating it, is also repugnant to Sec. 27 of Art. 4, of the Constitution of Missouri of 1865, in this, that it

was created by a special act of the General Assembly of the State of Missouri, when the same could and should have been accomplished by general law. The same necessity exists throughout all the rural districts for the creation of such a court, (if any,) that existed in the Sixth Judicial Circuit, and which are unlike those counties where large cities are located, such as St. Louis, Kansas City, St. Joseph, &c.; and even the local criminal courts established in those cities are made subordinate to and subjected to the supervising control of the circuit courts. *State v. Ebert*, 40 Mo. 186.

3. The law, passed by the General Assembly, (Sess. Acts of 1877, p. 357,) was only intended to apply to and regulate changes of venue, in courts of general jurisdiction or the circuit courts; and if it be construed to apply to inferior courts, then the record must show that the special judge was elected by the persons authorized by law to elect such a judge, and that the judge, so elected, was possessed of all the constitutional qualifications required; such court, being inferior, everything must be proven, and nothing taken as true by the doctrine of intendment or presumption. Sess. Acts of 1877, Sec. 2, pp. 357-8; Art. 6, Sec. 18, Constitution of 1865.

4. The law of 1877 does not purport to apply to the law providing for a change of venue, on account of the prejudice or other inability to serve, of the judge of the criminal court of the Sixth Judicial Circuit, and the county of Johnson, and could not apply to it, if so intended by the General Assembly. A different mode is provided for a change of venue, on account of the prejudice of the judge of this court, by the special act creating it. Sess. Acts of 1875, p. 42, Sec. 6; Sec. 53, Art. 4, of the Constitution of 1875; Sec. 34, Art. 4. *Id.*

5. The indictment in this case is invalid, inasmuch as it purports to have been found in a court which never existed, to-wit: the criminal court of Pettis county. The court, in which the case purports to have been tried, was

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created by a special law, and specially named, and the venue should have been laid in said court.

6. The order awarding the change of venue from Pettis to Johnson county, does not conform to the statute, which requires the order awarding the change of venue, to specify the grounds upon which it is based, and, also, to direct the clerk to make out and transmit to the clerk of the court, to which the venue is awarded, a transcript of the cause. Rev. Stat. 1865, Sec. 21, Ch. 212. These defects are not cured by an appearance where these papers were sent, as might be the case in a civil proceeding in a court possessed of general jurisdiction, and where the doctrine of intendment and presumption prevails. In a criminal case, the defendant stands upon his legal rights, is not presumed to waive anything, and, in a court of inferior jurisdiction, everything must be proven, and the record must show that the defendant has been awarded every legal right. *State v. Metzger*, 26 Mo. 65; *Schell v. Leland*, 45 Mo. 289; *State v. Lawrence*, 45 Mo. 492; *McCloon v. Beattie*, 46 Mo. 391; *Hansberger v. Pacific R. R. Co.*, 43 Mo. 200; *Bersch v. Schneider*, 27 Mo. 101; *Walker v. Turner*, 9 Wheat. 549; *Gibbs v. Shaw*, 17 Wis. 197.

7. The jury was improperly and illegally summoned. A special jury was summoned for the case before the December term of said court commenced, on or about November 30th, 1877, and before it was known whether the State or the defendant was ready for trial, and before the sheriff and his deputies took the requisite oath. Sec. 6, Ch. 80, Wag. Stat. 1872, p. 798. This being an inferior court, the record should show that the special panel of forty men, required in such cases, was procured strictly according to the mode provided by statute. *McGuire v. The People*, 2 Parker's Crim. Rep. 148.

J. L. Smith, Attorney-General, and Geo. P. B. Jackson  
for respondent.



1. The act creating the court, in which defendant was indicted, was not unconstitutional. Section one of article six of the constitution of 1865, as amended November 8, 1870, upon which appellant relies, provides that "the judicial power, as to matters of law and equity, shall be vested in a Supreme Court, in circuit courts, and in such inferior tribunals as the General Assembly may, from time to time, establish." But section thirteen, of article six, of the constitution provides, that "the circuit court shall have jurisdiction over all criminal cases, which shall not be otherwise provided for by law," and clearly shows that it was the intention of the framers of the constitution to confer upon the General Assembly power to establish, by statutory enactment, such courts as it might deem necessary, which should have exclusive jurisdiction of criminal cases. Section three of the act establishing the court in question, provides that "said court shall have the same jurisdiction as the circuit court now has in criminal case, etc." Acts of 1875, p. 42. Circuit courts, are courts of general jurisdiction, except as otherwise provided by law. The term "general jurisdiction," is defined to be "that which extends to a great variety of matters." 1 Bouv. Law Dict., p. 769 (14th Ed.) The term "inferior jurisdiction," is defined to be "that which extends only to certain specified causes." 1 Bouv. Law Dict., p. 769, (14 Ed.) So that it clearly appears from said section three of said act of March 18, 1875, which limits the jurisdiction of said court to certain causes therein named, that the court established by said act is an "inferior tribunal," i. e. one whose jurisdiction "extends only to certain specified causes." When the determination of a question of fact is submitted to the Legislature, its action thereon is final. *State ex rel., etc. v. Boone County et al.*, 50 Mo. 317; *State ex rel., etc. v. Pinger*, 50 Mo. 486; *Hall v. Bray*, 51 Mo. 288; *State ex rel. v. County Court of New Madrid County*, 51 Mo. 82; *City of St. Louis v. Shields*, 62 Mo. 247; *Harper v. Jacobs*, 51 Mo. 296; *Smith v. Haworth*,

53 Mo. 88; *State v. Able*, (decided this term); *Brown v. Buzan*, 24 Ind. 194.

2. And it is equally clear that the existence and validity of said court remained unaffected by the adoption of the constitution of 1875, as it is expressly provided in section four of the schedule to said instrument, that "all criminal courts, organized and existing under the law of this State, and not specially provided for in this constitution, shall continue to exist until otherwise provided by law." It will not be pretended that this court belongs to any of the classes "provided for in said constitution." In the language of this court in *ex parte Snyder*, 64 Mo. 58, the intention of said section four of said schedule was "to continue such criminal courts alone, as had an actual and not a mere potential existence." It is provided by section thirteen of said act of March 18, 1875, that a judge of said court should be appointed by the Governor, who should hold his office until the next general election. The next general election succeeding the going into effect of said act, was held on the first Tuesday after the first Monday in November, 1876. (Wag. Stat., p. 565, Sec. 1.) The constitution of 1875 went into effect on the thirtieth day of November of that year, (Sec. 13 of Schedule,) so that the criminal court of the Sixth Judicial Circuit and the county of Johnson, "had an actual and not a mere potential existence" at that time, and is saved by said section four of the schedule. See also sections one, twenty-six and thirty-one, of article six of the constitution, and section one of schedule thereto.

3. It does not appear, upon what state of facts, the objection, that the panel of forty men, from which the jury were finally chosen, were improperly summoned, is predicated. A paper is inserted in the transcript, which is neither a part of the record proper, nor has it been made such by bill of exceptions, nor does it appear to have either been filed or presented to the court below—and, therefore, this court cannot take notice of the same. Sam-

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*uels v. State*, 3 Mo. 68; *State v. Treace*, *supra*, p. 124. But, even if it could, the objection comes too late now. Wag. Stat. p. 797, Sec. 3; *State v. Ross*, 29 Mo. 32; *Lisle v. State*, 6 Mo. 426; *People v. Coffman*, 24 Cal. 233; Proffatt on Jury Trial, § 198.

4. The law itself is a sufficient order for the transcript to be sent to the proper officer. Wag. Stat. 1099, Sec. 30. Jurisdiction was conferred by the order of the court changing the venue, and the filing of the papers in the court to which the venue had been changed, was only one of the necessary steps to be taken in the progress of the cause. *Henderson v. Henderson*, 55 Mo. 534, 544.

5. No omission or defective statement in the introductory clause of the indictment proper, will affect the validity or sufficiency of the indictment; it forms no part of the caption. Bishop on Crim. Prac. (2d Ed.) §§ 662 & 668; Whart. on Crim. Law, (4th Ed.) §§ 219 & 223; *State v. Freeman*, 21 Mo. 481; *Kirk v. State*, 6 Mo. 469; *McDonald v. State*, 8 Mo. 283; *State v. Ames*, 10 Mo. 744.

6. Defects in the caption, or even the omission of the caption, cannot be noticed on the hearing of a motion in arrest. *State v. Gilbert*, 13 Vt. 647; *State v. Nixon*, 18 Vt. 74; *State v. Thibau*, 30 Vt. 100, 104.

7. Even if the caption was not of the record as above argued, but was the introduction to the indictment, the objection could not be urged now, for the supposed defect or imperfection does not tend to the prejudice of the substantial rights of the defendant upon the merits. Wag. Stat., 1090, Sec. 27.

NORTON, J.—The defendant was indicted for murder in the first degree, at the April term, 1877, of the criminal court of the Sixth Judicial Circuit and the county of Johnson, in and for the county of Pettis.

On the application of defendant, based on the prejudice of the inhabitants of Pettis county, a change of venue was awarded at the November term, 1877, of said court,

to the criminal court of the Sixth Judicial Circuit, and the county of Johnson, in and for Johnson county.

At the December term, 1877, of said court, defendant, having been duly arraigned, filed his affidavit, alleging that he could not have a fair trial on account of the prejudice of the judge, and praying for such order as he might be entitled to under the law.

The court, thereupon, ordered an election to be held for a special judge, as is provided in the act of 1877, page 357. This election was held, and resulted in the choice of A. W. Rogers, as such special judge, who, after taking the oath required by said statute, proceeded to preside at and conduct the trial. The result of the trial was a verdict of guilty of murder in the first degree. Motions for a new trial and in arrest of judgment having been made and overruled, defendant brings the cause here by appeal. The points relied upon for a reversal of the judgment are: That the act of the General Assembly, approved March 18th, 1875, Acts 1875, page 42, creating the criminal court for the Sixth Judicial Circuit and Johnson county, is unconstitutional; that the act of 1877, Acts 1877, page 357, authorizing the election of a special judge, is also unconstitutional; that the act of 1877, if constitutional, does not apply to the criminal court of the Sixth Judicial Circuit and Johnson county, and does not repeal section 6, of the act of 1875, which declares that when a change of venue shall be granted because of the prejudice of the judge, it shall be to the circuit court of the county in which the cause is pending. It is argued that the criminal court created by the act of 1875, *supra*, is not an inferior court, and that the said act is, therefore, repugnant to section 1, article 6, of the constitution of 1865, which provides "that the judicial power shall be vested in a Supreme Court, in district courts, in circuit courts, and in such inferior tribunals as the General Assembly, may from time to time, establish."

It is manifest that, under this section, the Legislature

could not establish other judicial tribunals, than those named, unless they were inferior to them.

1. COURTS—INFERIOR

What tests are to be applied in determining the question of inferiority? It may be solved by showing that the court is either placed under the supervisory or appellate control of those named, or that the jurisdiction conferred upon it is limited and confined. Conceding that the act in question does not place the court which it creates under the supervisory control of the circuit court, and only allows appeals and writs of error to be prosecuted directly to the Supreme Court, yet it will still be an inferior tribunal if its jurisdiction is limited and inferior. General jurisdiction is that which extends to a great variety of matters. Limited jurisdiction, also called special and inferior, is that which extends only to certain specified causes: 1 Bouvier, (14 Ed.,) 769. The jurisdiction conferred upon the criminal court by the act of 1875, is of the latter class.

It may further be said that it was clearly contemplated by the 13th Sec., Art. 6, constitution 1865, that the Legis-

2. —: criminal court of the sixth judicial circuit, and the county of Johnson, an inferior and constitutional court.

lature might provide by law for taking from the circuit courts jurisdiction over all criminal matters. That section declares "that the circuit court shall have jurisdiction over all criminal cases which shall not be otherwise provided for by law." Criminal jurisdiction was thus conferred upon circuit courts, which they could exercise till deprived of it by legislative action. The act of 1875 creates a tribunal inferior in the limited jurisdiction conferred upon it; that jurisdiction extending only to criminal cases, which Sec. 13, *supra*, of the constitution, by necessary implication, authorized to be done. Besides this, if irregularities existed in the establishment of this court, or the validity of the act creating it is brought in doubt, these irregularities may be regarded as cured, and the doubt solved by the express recognition which this and all criminal courts have received in the constitution of 1875. It is provided in Sec. 4, of the schedule of that instrument, "that all courts organized and



existing under the laws of this State, and not specially provided for in this constitution, shall continue to exist until otherwise provided for by law."

The criminal court of the Sixth Judicial Circuit and Johnson county being organized and existing at the time of the adoption of the constitution, had vitality imparted to it till otherwise provided, and may be said to live by virtue of the organic life given it in the section quoted.

In case of *ex parte Snyder*, 64 Mo. 58, this court held (Judge SHERWOOD delivering the opinion), in regard to Sec. 4, *supra*, "that in thus specifying and singling out such criminal courts only as were organized and existing," the framers of the constitution must be presumed to have had in mind the whole subject, and to have intended to continue such criminal courts above as had an actual, and not a potential existence. The debates of the convention will show that this identical court was intended to be continued by the framers of that instrument till the Legislature might see fit to abolish it or otherwise provide; and to remove all question in regard to the inferior character of such criminal courts as were then organized and existing, it is provided in Sec. 23, Art. 6, of the constitution of 1875, that the circuit court shall exercise superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits. This section, which is materially variant from Sec. 21, Art. 6, of the constitution of 1865, expressly places the criminal court in question as well as all others existing, or which thereafter, may be created, in the attitude pertaining to inferior tribunals, and this, without regard to the act creating them, so that the first test for determining the inferior character of a court hereinbefore mentioned might well be applied in this case.

The further objection, that the act of 1875 is obnoxious to that provision of the constitution of 1865, which prohibits the enactment of a special law when a general

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law could be made applicable, is answered by the reasoning of this court in the case of the *State v. Ebert*, 40 Mo. 186. It was a question of fact for the determination of the Legislature, whether in the four large and populous counties of Lafayette, Saline, Pettis and Johnson, comprising within their limits three cities of considerable population, a necessity existed for establishing a criminal judicial circuit which did not exist in other parts of the State; and with this Legislative discretion we have no right to interfere. This view is sustained by the fact that our present constitution, unlike the one it superseded, provides "that whether a general law could have been applicable is hereby declared to be a judicial question, and as such shall be judicially determined without regard to any legislative assertion upon the subject."

We are not asked to reconsider the views expressed in the case of the *State v. Able*, in regard to the constitutionality of the act of 1877, but it is insisted that the <sup>change of venue.</sup> act does not apply to the criminal court of the Sixth Judicial Circuit, and county of Johnson, in so far as it relates to changes of venue and the election of a special judge. In support of this view, we have been cited to section 6, of the act of 1875, which provides: "In all cases where a change of venue is granted from said criminal court, on the ground of prejudice or other disqualifications of the judge of said court, the same shall be certified to the circuit court of the county in which said cause shall be pending."

It is claimed that, under this section, notwithstanding the act of 1877, *supra*, the cause should have been certified to the circuit court of Johnson county, and that the order for the election of a special judge was, therefore, unauthorized.

We do not perceive the force of this objection, for section 4 of the act of 1875 expressly provides, "that all acts now in force, or that may hereafter be enacted, regulating the criminal practice and proceedings in courts of

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record, \* \* \* shall govern the proceedings in said criminal court so far as the same may be applicable." Now the act of 1877, was an act regulating criminal practice, the first section of which declares "that hereafter no change of venue shall be awarded in any indictment or criminal prosecution, in any circuit or criminal court, in either of the following cases," the prejudice of the judge being one of the specified causes. The second section provides that whenever in any cause an application shall be made for a change of venue, for any one or more of the specified causes, the judge shall make an order for the election of a special judge to try the case.

The 4th section expressly repeals sections 15 and 20, article 5, chapter 111, Wag. Stat., 1097, which authorized a change of venue on account of the prejudices or other disqualifications of the judge, and it also repeals all acts, or parts of acts, inconsistent with the provisions of the act.

It thus appears from the above that the criminal court, by the terms of the act creating it, was to be governed in the exercise of its jurisdiction, by the laws in force regulating criminal practice and proceedings, and it also appears that the act of 1877, is a law regulating criminal practice, and absolutely forbids a change of venue to be made in any criminal case, where the application for the change is founded on the prejudice or other disqualification of the judge, and commands that in all such cases the court shall order the election of a special judge to try the cause. The court below was powerless to make any other order than the one it made.

It is further objected that the record does not show that the judge who was elected was voted for by duly enrolled and licensed attorneys of this State, nor that he possessed the qualifications of a circuit judge, and as the criminal court is an inferior tribunal, nothing is to be presumed in favor of its jurisdiction. Conceding that inferior courts not being courts of record, nor exercising jurisdiction according to the

4. —: what it is not necessary that its record should show.

State v. Daniels.

course of the common law, everything necessary to confer jurisdiction must appear, and that nothing can be presumed or intended, we think the doctrine has no application here, because the criminal court in question is a court of record, so made by the act bringing it into being, and can and does exercise the jurisdiction conferred upon it according to the course of the common law. (*Johnson v. Beasley*, decided April term, 1877).

Besides this, the record recites substantially all that is requisite. It shows that the application was made by defendant, based on the prejudice of the judge; that thereupon an election of a special judge was ordered; that members of the bar, exceeding three in number, voted at the election; that it was conducted by the clerk of the court; that it resulted in the election of Rogers, who, before entering upon his duties, took and subscribed the required oath; that all this was done in the presence of the accused, and the general statement that the election was held according to the provisions of the law. It would seem that there is nothing left here for intendment, for it is difficult to conceive of a member of the bar of the court of the State who is not duly licensed and enrolled as such.

It is also objected that the indictment is invalid because it purports to have been found in a court which never existed, to-wit: the criminal court of Pettis county. This objection is based upon the name given to the court in the caption or introductory part of the indictment, which is as follows:

5. INDICTMENT: objection to, based upon caption of.

STATE OF MISSOURI, }  
County of Pettis, } ss.

In the criminal court of Missouri, Pettis county, Missouri:  
The Grand Jurors, &c.

This objection is answered by the case of the *State v. Freeman*, 21 Mo. 482, where it was held, Judge Leonard speaking for the court, "that the caption formed no part of the indictment, but it must appear on the face of the record while the cause is in the court where the indictment

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was found, and from the transcript of the record after its removal into this court on appeal, or writ of error, not only that the indictment is sufficient in form and substance, but also that it was properly preferred by a lawful grand jury to a court having jurisdiction over the subject, and if all this does not appear, it is error of which the defendant may take advantage. But if it does appear it is sufficient, although the commencement of the indictment be wholly omitted. The following cases are to the same effect: *Kirk v. State*, 6 Mo. 469; *McDonald v. State*, 8 Mo. 283.

The record before us shows all these things, and that the indictment was returned into the criminal court of the Sixth Judicial Circuit and Johnson county, in and for Pettis county. This court will take judicial notice of the fact that Pettis county is one of the counties in the Sixth Judicial Circuit. The act of 1875, created a criminal judicial circuit, composed of the counties of the Sixth Judicial Circuit and the county of Johnson, and the court thus created, might properly be designated as the criminal court for each one of the counties embraced in such criminal judicial circuit.

It is further insisted that the judgment should be reversed, because the order changing the venue does not state the ground upon which it was based, and because it directs the clerk to forward the transcript to the clerk of the criminal court of Johnson county, and that there is no such court. In supporting this point, we have been cited to the 21st Sec. Wag. Stat., 1097, which provides "that every order for the change of venue in a cause, shall state whether the same is made on the application of the party or on facts within the knowledge of the court or judge, and shall specify the cause of removal, and designate the county to which the case is removed." We think this section has been complied with. The petition and application of defendant for a change of venue, are set out in full in the record, and are referred to in the order making the change as a foundation for it. The county to

7. CHANGE OF  
VENUE.



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which the cause was removed, is also designated, to-wit: to the criminal court of the Sixth Judicial Circuit and Johnson county, within and for the body of the county of Johnson.

The direction contained in the order to the clerk that he transmit a transcript of the record to the clerk of the criminal court of Johnson county, may be regarded as mere surplusage, inasmuch as under Sec. 30, Wag. Stat., page 1099, it is made the duty of the clerk of the court making the order changing the venue, to make out a full and complete transcript of the record and proceedings, and transmit the same to the clerk of the court to which the removal is ordered. The criminal court of Johnson county obtained jurisdiction of the cause when the order granting the change was made, although it did not become possessed of the case till the transcript required by law to be made was filed. *Henderson v. Henderson*, 55 Mo. 544.

The point made by defendant as to the illegality in summoning the panel of 40 jurors from which a jury was to be chosen to try the case, cannot be considered here, for the reason that there is nothing either in the record proper or the bill of exceptions upon which to base it. It is true that there appears on the transcript on the third day of the trial, the names of forty men, accompanied by a certificate of the clerk stating that it was a true copy of a list of jurors furnished him by the sheriff, and summoned in the case of the *State v. Daniels*, and also accompanied by the certificate of the sheriff that he had furnished the list to the defendant on the first day of December, 1877. The trial had progressed two days before this paper was produced. It does not appear that it was offered as evidence, or that any action was asked to be taken in consequence of it, or that it was brought to the attention of the court for any purpose of the trial, nor is it in any manner referred to in the bill of exceptions.

Assuming, however, that it was offered as an objection

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to the jury further proceeding in the trial of the cause, the court below would have been justified in overruling it under the decisions of this court in the *State v. Ross*, 29 Mo. 53; and *Lisle v. State*, 6 Mo. 426.

The only remaining ground brought to our attention is, that the prosecuting attorney, in his closing argument, used language and made statements of facts not warranted by the evidence to the prejudice of defendant. This position is not maintainable, for the reason that there is nothing whatever preserved in the bill of exceptions tending to show that such was the fact. We have not only carefully considered every point brought to our attention by defendant, but have looked through the record to see that in the trial and conviction of the accused all the forms of law have been complied with, and that he has had accorded to him all the rights to which he was entitled. The evidence in the case not being preserved, we might be excused from an examination of the instructions. We, however, find nothing in them to justify our interference or a disturbance of the judgment. The cause, so far as the record shows, was well and fairly tried, and the judgment, with the concurrence of the other judges, will be affirmed, except Judge HENRY, not sitting.

AFFIRMED.

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THE STATE V. HART, *Appellant*.

1. **Criminal Law: GRAND JURY: SHERIFF.** It is no ground of exception in a criminal case that the grand jury, by which the defendant was indicted, was not selected in the manner prescribed by law; nor, that the record fails to show that the sheriff and his deputies took the prescribed oath before summoning the grand jury.
2. **The Probate and Common Pleas Court of Greene County** was not abolished by the constitution of 1875.
3. **Criminal Law: EVIDENCE.** Upon the trial of a criminal case, proof that, since the finding of the indictment, defendant was ar-

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rested in a distant State on another indictment, and that he attempted to escape, is inadmissible.

For the purpose of showing that he has attempted to avoid the prosecution, the indictment, on which he is being tried, may be read in evidence in connection with proof that he has previously forfeited his recognizance and left the State. But the court should instruct the jury that it is admissible as evidence for this purpose only, and should not leave them to infer that in determining the guilt or innocence of defendant, they have a right to consider the fact that the grand jury has indicted him for the crime.

4. ———: ———. Upon a trial for a felonious assault, evidence that the person alleged to have been assaulted by defendant, was on the same day assaulted by others, and was subsequently killed, is inadmissible.

*Appeal from Webster Circuit Court.*—HON. W. F. GEIGER,  
Judge

*Indictment for a Felonious Assault.*

It appeared from the evidence adduced at the trial, that on the 14th day of March, A. D. 1873, one George W. Davis and the appellant were both in the town of Billings, a small town in the northwestern portion of Christian county, attending the preliminary examination of certain parties charged with an assault upon Davis. This was on Friday, and the assault on Davis had been made on the Sunday preceding, during which he was shot through the right arm, which he was then carrying in a sling. Davis was sitting on a box in front of a store, when he saw Hart, and remarked that he, Hart, was at the bottom of all this devilment, or words to that effect. Hart replied by saying, that Davis was a d—d liar. Hart thereupon drew his revolver from its scabbard, and pointing it at Davis, snapped it, but it did not discharge. The witnesses differ as to whether Davis had drawn his pistol prior to this time or not. Some of the witnesses state that Davis then drew his revolver, and that the appellant snapped his twice more at Davis. Both of the parties were then arrested and dis-

armed. The defendant's revolver was afterwards restored to him.

The State also offered the indictment, recognizance of defendant and order of record forfeiting the same, and to show by one Langston that he had found him in Texas after a long search, and brought him back. This was objected to, but was admitted.

*C. B. McAfee* for appellant.

1. The point made in arrest of judgment is that the record shows on its face that the law of 1873, (that had repealed all other statutes on the subject,) was wholly disregarded in organizing the pretended grand jury, and the decisions of our courts, on this subject, are not applicable, for there was no grand jury to challenge; the judge had no authority to make the pretended organization. It does not appear from the record that the sheriff had qualified, by taking the necessary oath, before he selected the pretended grand jury.

2. The probate and common pleas court of Greene county, was abolished by the adoption of the new constitution, and it had no jurisdiction to make any orders in this case.

3. I suppose that perhaps this is the first time in the history of criminal practice in this country, that it has been held that the indictment is competent evidence to prove defendant's guilt on an issue made by the plea of not guilty; and it will not answer to say that defendant was not injured by this testimony, because the State has had the benefit of it, and has the ruling of the court in presence of the jury, that it is competent evidence, and is in this matter also estopped from saying that it did not have the effect intended. Besides the average juror is constitutionally prone to the belief that the mere fact of indictment of an individual is *prima facie* evidence of guilt.

4. The testimony of the witness Sullivan was incompetent; because, if defendant was not implicated in the

night shooting, then all testimony concerning the same was improper and calculated to prejudice defendant. If he was charged with these other assaults also, then it was improper testimony, because he was on trial for a different and separate assault. There is but one count in the indictment.

*J. L. Smith*, Attorney-General, for the State.

1. The testimony shows that Davis and Hart entertained very bitter feelings towards each other, and that various altercations had taken place between them previous to this time, and that on Sunday prior he had been assaulted and shot through the arm, and that he wore his right arm in a sling on the day of the assault in this case. Having in view all these facts, it clearly appears that this evidence was not only admissible, but imperatively necessary to properly inform the jury of the relations that existed between the parties, and as a circumstance tending to show that Hart made the "assault with design and intent, him, the said George W. Davis, then and there, willfully and feloniously to kill and murder." For the same reasons was the evidence of the assault upon Davis in the night of the same day, admissible. It was also a part of the *res gestae*. All the proceedings at Billings on that day were part of the same assault, and all the circumstances of that day's proceedings were part of the *res gestae*.

2. The objections to the evidence as to defendant's flight to Texas were properly overruled. It is well settled that when a person stands charged with a crime, and he seeks to escape a trial by flight, the evidence of such flight is competent as a circumstance tending to show his guilt. The objection, that the defendant fled for the reason that he was indicted for the murder of Davis, is disposed of by the twelfth instruction, given at his request, which told the jury "that although they might believe from the evidence that defendant forfeited his bond for



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appearance for trial in the Greene circuit court, on the charge for which he is now on trial, and was subsequently found in Texas, and brought back, and attempted to escape from the witness Langston; if they believe that such absence in Texas, and failure to appear, and attempt to escape was not on account of the present charge, now on trial, and was not to avoid trial on the same, then such facts are no evidence of guilt in this case."

3. The second ground of the motion in arrest of judgment, is that "the indictment was not returned by a legally constituted grand jury as required by law." The April term, 1873, of the circuit court of Christian county, at which this indictment was found, convened on the third Monday in April of that year, (See Acts of 1873, page 40), which was on the 23rd day of that month. Prior to March 15, 1873, the grand jurors throughout the State were selected and summoned by the sheriffs of the respective counties. 1 W. S., page 798, § 8. On said March 15, 1873, an act was approved to take effect, from and after its passage, providing that grand jurors should be selected by the county courts, thirty days before the commencement of the circuit court, &c., (Acts of 1873, page 46). When the circuit court of Christian county met in April, 1873, it appearing that the county court had failed to comply with this act, it ordered the sheriff to summon eighteen competent grand jurors. This was done, and the men so summoned were duly sworn, charged and empaneled, and returned, among others, the indictment herein. No objections were made to the grand jury until after the trial, and it was then too late. Wag. Stat., 797, § 3; 1081, § 2; 1081, § 3; *State v. Bleekley*, 18 Mo. 428.

HENRY, J.—The defendant was indicted at the April term, 1873, of the Christian circuit court, for a felonious assault upon one George W. Davis. The cause was taken on a change of venue to the Greene circuit court, thence to the probate and common pleas court of Greene

county, and thence to the circuit court of Webster county, in which, at the March term, 1877, there was a trial resulting in the conviction of defendant. After unsuccessful motions made by him for a new trial, and in arrest of judgment, he appealed to this court.

The term of the Christian court, at which defendant was indicted, commenced on the 21st day of April, 1873, and the county court of that county having

1. CRIMINAL LAW:  
grand jury: sheriff

failed to select a grand and petit jury in the manner provided by the act of the General Assembly, approved March 15th, 1873, the court ordered the sheriff to summon a grand and petit jury, and by the grand jury so summoned, this indictment was preferred.

Defendant contends that the grand jury so summoned was not a legally constituted grand jury. If it were a question now for the first time submitted to this court, I should hesitate to say that a grand jury selected in a manner directly contrary to that expressly prescribed by the act of the General Assembly, was to be recognized as such, but in the case of *The State v. Bleekley*, 18 Mo. 429, in which this question was before the court, it was held that the defendant, indicted by a grand jury selected in contravention of an express statutory enactment, could not object to the composition or organization of the grand jury, and that case has either been followed or approved in the *State v. Petts*, 58 Mo. 557; *State v. Breen*, 59 Mo. 413; *State v. Jones*, 61 Mo. 373; *State v. Connell*, 49 Mo. 282. The same cases also determine that the failure of the record to show that the sheriff and his deputies took the prescribed oath, will not avail the defendant as a ground for arresting the judgment.

The Probate and Common Pleas Court of Greene county was not abolished by the new constitution adopted in 1875; and by an act approved March 4, 1869, jurisdiction was conferred upon that court to try any civil or criminal cause which the circuit judge of said county was disqualified

2. THE PROBATE  
& COMMON PLEAS  
COURT OF GREENE  
COUNTY WAS NOT  
ABOLISHED BY THE  
CONSTITUTION OF  
1875.

ified from trying, and provision was made for the transference of such causes from the circuit court to the Probate and Common Pleas Court of Greene county. Having been transferred from the Greene circuit court to said Probate and Common Pleas Court, and sent by the latter court, on change of venue, to the Webster circuit court, that court acquired jurisdiction of the cause. This disposes of defendant's objections to the grand jury, the failure of the record to show the oath taken by the sheriff and deputies, and to the jurisdiction of the Webster circuit court.

There was an irreconcilable conflict of testimony on the trial. The evidence for the State established an unpro-

3. CRIMINAL LAW:  
evidence.

voked assault with intent to kill. That for the accused, by an equal number of witnesses, a clear case of self-defense. The State's evidence all tended to show that Davis, the party assaulted, accused defendant of having instigated an assault made upon him several days before, and that defendant gave Davis the d—d lie and simultaneously drew a revolver, pointed it toward defendant and snapped two caps at him. The evidence for the defense was that Davis made the accusation and then commenced drawing his revolver, and that defendant did not attempt to shoot until Davis had drawn his pistol.

There was abundant evidence of threats made by Davis that he intended to kill the defendant, brought down to the very day that this difficulty occurred, and communicated to the defendant both before and on the day of the difficulty. The court, against the objection of defendant, admitted the evidence of R. H. Langston, that in 1875, in Texas, he arrested the defendant on an indictment in another case, and that he attempted to escape. The record does not disclose what case that was, but the evidence of Langston was that it was not the case we are considering, and that he was tried and acquitted of the charge for which he was arrested in Texas.

The record does show that defendant forfeited a recognizance for his appearance in this case, but that was

the only evidence which tended to show that he had made any attempt to avoid this prosecution. The court permitted the State to read the indictment herein as evidence to the jury, in connection with the evidence of Langston and of the forfeiture of the recognizance. It is clear, that the evidence of Langston, of the arrest of defendant in Texas, on another charge, and his attempt to escape, was inadmissible, and that under the circumstances, the court should have explained to the jury the object of introducing as evidence the indictment against the defendant. It was admissible to show that when he forfeited his recognizance and left the State, an indictment was pending against him. It was competent for that and for no other purpose, and the jury should have been so informed by the court. The privilege of reading the indictment to the jury in the statement of the case, is accorded to the State. We do not know that the right to do so has ever been questioned, and presume from the prevalence of the practice, that in stating this case, the indictment was read to the jury.

It may be asked how, then, could reading the indictment again to the jury have prejudiced the defendant. The reading of the indictment by the attorney in his statement, would not have the weight and significance which would attach to it, when, with the sanction of the court, read as evidence in the cause. Whatever is read or admitted to the jury as evidence, is for their consideration as such in determining the issues they are trying, and when the court permitted the State to read the indictment as evidence, without any limitation to its application, or any explanation of the purpose for which it was introduced, the jury may have taken it as an intimation from the court that in determining the guilt or innocence of the accused, they had a right to consider the fact that the grand jury had indicted him for the crime.

We cannot say that defendant was not injured by the evidence of Langston, and the reading of the indictment to the jury, without any qualification. The case was very

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evenly balanced on the evidence, and the testimony thus admitted, may have turned the scale against the defendant.

The evidence of Henry Sullivan in regard to a difficulty between Davis and other parties than defendant, on 4. —: — the evening of the day of the difficulty between Davis and defendant, was incompetent, and should have been excluded, and evidence of the same character is to be found in the testimony of several of the witnesses for the State. The 14th instruction asked by defendant should, therefore, have been given. It asked the court to declare that in determining the guilt or innocence of defendant, the jury should be governed by the evidence alone, and not be influenced by the consideration that Davis was assaulted at other times, before or after the difficulty they were then investigating, or that Davis was subsequently killed. The evidence before alluded to having been admitted, this instruction should have been given, although it may be questioned whether it would have cured the error of admitting such evidence.

In other respects we think that the instructions, though not faultless, are not so defective as to warrant a reversal of the judgment; but for the errors above indicated, the judgment is reversed and the cause remanded. All concur.

REVERSED.

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KEANE, *Appellant*, v. KYNE.

**Removing Cloud on Land Titles.** A suit to remove a cloud upon the title to land cannot be maintained by one not in actual possession of the land; nor where the evidence preponderates against the existence of the alleged cloud.

*Appeal from St. Louis Court of Appeals.*

*Samuel Erskine and Jecko, Hospes & Jecko* for appellant.



*Marshall & Barclay* for respondent.

Plaintiff's own testimony showed that he was never in possession of the land for a moment. No principle of equity is better settled than that in order to maintain a suit to remove a cloud on title, the plaintiff must not only show a legal title to the land, but must prove himself in actual possession of the land in suit; the reason of this rule being that if plaintiff is not in actual possession of the land, and defendant is, then the plaintiff's remedy is at law, by ejectment; but if the land is in possession of a third person, it would be frivolous for a court of equity to adjudicate a dispute in which the subject-matter was in the power of a third party who might have a better title than either party in court. Hence courts of equity will not undertake to remove a cloud from title unless plaintiff establishes his actual possession to the land in suit. *Orton v. Smith*, 18 Howard 263; *Polk v. Pendleton*, 31 Md. 118; *Herrington v. Williams*, 31 Texas 448. *Barron v. Robbins*, 22 Mich. 35; *Lake Road Co. v. Bedford*, 3 Nevada 399; *Harris v. Smith*, 2 Dana 11; *Alton Ins. Co. v. Buckmaster*, 13 Ill. 205.

SHERWOOD, C. J.—The plaintiff seeks to remove what he terms a cloud upon his title to a certain lot in the city of St. Louis, caused, as he claims, by a forged deed purporting to have been executed by himself to defendant, in 1873. The answer denied plaintiff's ownership or possession of the lot, and the forgery of the deed, &c. The court entered a decree for the plaintiff, which was reversed at general term, and on appeal to the court of appeals, the petition was dismissed, and the plaintiff appeals here.

1. We approve the action of the court of appeals in dismissing the petition, and for the following reasons: We regard the evidence greatly preponderating in favor of the genuineness of the deed of February, 1873, notwithstanding plaintiff swore he did not execute it, and was disabled physically from such execution, at the time the instrument

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bears date, and the certificate of acknowledgement purports to have been made; and notwithstanding his testimony in the particular of disability finds support in that of others. His testimony as to non-execution is met by the certificate of acknowledgement of the notary, (since deceased,) by the testimony of two experts, who comparing the signatures of the defendant voluntarily made during the progress of the trial, with the signature in question, had no doubt as to the genuineness of the latter; by the fact, as plaintiff's own testimony shows, that his brother-in-law, Kyne, the husband of defendant, had paid the taxes on the lot in question, from the year 1858, down to the time of his decease in October 1873, notwithstanding the plaintiff had become the recipient of the legal title from Kyne, by reason of the deed made in 1863; and by the fact that plaintiff on one occasion, as he himself states, at the instance of Kyne, gave a note and executed a deed of trust on the lot in question for \$1,000, allowed Kyne to receive the money, never giving the matter any further thought or attention, or seeing that the debt thus created was satisfied. When we consider all these facts in connection with what is equally well established, that plaintiff never took possession of, or exercised any acts of ownership over the lot in question; never paid any taxes thereon, or even attempted to do so, until shortly after the death of Kyne, when he says he was surprised by finding the alleged forged deed on record, we are constrained to the conclusion that every reasonable hypothesis deducible from the evidence, favors the idea that the deed of 1873 was not forged, but the genuine act and deed of him, the plaintiff. Looking then to the evidence alone, the plaintiff cannot succeed.

2. But there is another ground which must prove equally potent in precluding plaintiff of success, and this, regardless of the evidence adduced: He was not in possession of the lot in question. And authority is abundant to show that only when this is the case, can equitable interposition, as here prayed, be successfully invoked. The

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obvious reason is, that when a party is himself in possession, he cannot resort to a court of law to try the title, and therefore must needs come into a court of equity. (1 Story Eq. Jur., Sec. 711 a, 11th Ed.; *Orton v. Smith*, 18 How. 263; *Polk v. Pendleton*, 31 Md. 118, and cases cited.) Holding these views, we affirm the judgment of the court of appeals. All concur.

AFFIRMED.

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PHILLIPS V. COUCH, *Appellant*.

**Arbitration.** The parties to a promissory note differing as to the amount remaining due upon it, referred their difference to arbitrators, who fixed the amount and informed the parties. The holder thereupon surrendered the note to the maker, who accepted it; *Held*, that he thereby assented to the award, and became bound to pay the amount fixed by the arbitrators, although they may not have proceeded regularly in ascertaining it.

*Appeal from Andrew Circuit Court*—HON. H. S. KELLY  
Judge.

The following instructions were given by the court:

1. A settlement of the matters in dispute between the parties may lawfully be made by agent, and will bind the parties, provided the acts of the agent in and about such settlement and matters considered by them, in all such matters and things as they, as such agents, are authorized to consider by the principals, and their settlement will not bind the principals, if the agent neglect or omit any material or substantial right of the principal, and if the jury believe that J. C. Couch and Howell, although duly authorized to settle the matters in dispute between plaintiff and defendant, failed or refused to consider evidence upon such substantial matter in dispute, then you must find for defendant. If, however, the said J. C. Couch and Howell, understood and knew what matters were in

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dispute, and what they were called upon to settle, it will be sufficient, whether they heard other or further evidence or not.

2. This is a suit to recover \$75, balance alleged to be due from defendant to plaintiff on a settlement. Defendant denies that there was a settlement, or that there was or is anything due plaintiff. If you find from the evidence that there were differences between plaintiff and defendant, and that they mutually agreed to submit the matters of dispute or difference to J. C. Couch, with the agreement that they would abide by and perform his decision, and that after hearing the statements of the parties, and examining the matters in dispute the said J. C. Couch declined to decide between them without the assistance of another man, and that plaintiff and defendant then agreed to call in one Howell to assist the said J. C. Couch in making a settlement, and that the said James Couch and Howell did arrive at a decision and settlement of the matters in dispute, and that, by said settlement, it was required that defendant should pay the plaintiff \$75 as a balance due on said settlement, and that the result of the said settlement was communicated to the said parties, and they assented to it or agreed to it, and plaintiff performed his part of the terms of the same, then the settlement became binding upon the parties; and if you find from the evidence that the defendant has failed to pay the said balance of \$75, you should find for the plaintiff the sum of \$75 with interest at 6 per cent. per annum from the date of said settlement; but if you find no settlement was made with the parties, either by themselves or by the said James Couch and Howell, acting for said parties by their agreement, of the matters in dispute, by which any balance was found to be due from the defendant to plaintiff, you should find for the defendant.

The following is the instruction given at the instance of plaintiff:

It was competent for the parties to assent to and agree

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to a finding of J. C. Couch and John B. Howell, as well by acts as by words. Therefore, if the jury find from the evidence that the said J. C. Couch and John Howell found and agreed that defendant should pay plaintiff \$75, and that the fact was communicated to defendant, and that defendant did not refuse to abide by such settlement, but then and there knowingly received the \$100 note in question from plaintiff's wife, at plaintiff's direction, as a part settlement of the matters between them under such finding, then such conduct on the part of the defendant was a ratification of the finding of said J. C. Couch and John B. Howell, and the defendant is bound thereby.

The following instruction is No. 4 as asked by defendant, and refused by the court:

"A settlement of the matters of difference between the parties may lawfully be made by agent, and will bind the parties, provided the acts of the agent in and about such settlement, and matters considered therein by them, on all such matters and things as they, as such agents, are authorized to consider by the principals; and their settlement will not bind the parties principal if the agents neglect or omit any material or substantial right of the principal. And if the jury believe that James C. Couch and John Howell, although duly authorized to settle the matters in dispute between plaintiff and defendant, failed or refused to consider evidence upon any substantial matter in dispute, then they must find for defendant."

The following is instruction No. 1, given at the instance of defendant:

If the jury believe, from the evidence, that plaintiff and defendant, prior to the 6th day of August, had mutual demands against each other, and disagreed as to such demands and the true state of their accounts, and that about that date Couch and Howell were requested to arbitrate said matters in dispute, and that said arbitrators, without qualifying as required by law, and without examining witnesses, papers, or other evidences of the state of the



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accounts between plaintiff and defendant, and without the knowledge or consideration of the receipt in dispute on the part of said Howell, agreed that defendant should pay plaintiff seventy-five dollars; and if they further believe from the evidence that said arbitrators made no written finding or award in such case, and delivered no award or finding to said defendant, they will find for defendant, unless they further find that defendant, after the finding, promised in writing to pay plaintiff, or knowingly received from plaintiff some valuable consideration, or knowingly accepted from plaintiff the promissory note dated May 22, 1873.

*J. D. Strong* for appellant.

1. Plaintiff did not intend to, nor could he, proceed by motion, to confirm an award, either statutory or other. There was no written submission nor stipulation for a judgment. Wag. Stat., p. 143, § 1. The arbitrators were not sworn. Wag. Stat., p. 143, § 3. They neither heard evidence nor examined the matters in dispute, but "guessed" or "lumped" it. Wag. Stat., p. 143, § 5. They made no written award, and published none, nor was there attestation of any. Wag. Stat., p. 143, § 6; *Newman v. Labaume*, 9 Mo. 29; *Valle v. N. M. R. R.*, 37 Mo. 445. There was no motion to confirm award. Wag. Stat., p. 144, § 7. No copy was served upon defendant. *Ib.*, § 8. Every characteristic of a statutory award was wanting. The statement sued on calls it a "settlement"—a "balance due on settlement."

2. The evidence did not tend to show a settlement of the differences between the parties. *Cape Girardeau, &c., R. R. v. Kimmel*, 58 Mo. 83; 1 Parsons on Contracts, pp. 475, 476; *Johnston v. Fessler*, 7 Watts 48; *Stenton v. Jerome*, 54 N. Y. 480; *Town v. Wood*, 37 Ill. 512; *Kronenberger v. Binz*, 56 Mo. 121.

3. If the finding was properly made, and by persons

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duly authorized, no ratification nor estoppel was needed to make it of force. If not properly made, and by authority, neither silence, nor apparently express ratification, will give it force against the party who is ignorant of his rights at the time. The only finding of Couch and Howell that is spoken of is, that defendant should pay to plaintiff \$75, and the only conceivable thing for plaintiff to do in order to "ratify" it, is to receive the \$75. He is not directed by the finding "to deliver to defendant any note, or other thing whatever." This "fact" is not communicated to defendant, viz: That he is to receive a \$100 note from plaintiff "as a part settlement under such finding." How, then, is "such conduct on the part of defendant, a 'ratification of such finding' if the arbitrators did not include that in their 'finding?'"

*Allen H. Vories* for respondent.

1. The instructions given on the part of the plaintiff, the defendant, and on the court's own motion, presented all the issues to the jury and covered the whole case. *Talbot v. Mearns*, 21 Mo. 427; *Thomas v. Babb*, 45 Mo. 384; *McKeon v. C. R. Co.*, 53 Mo. 405

NAPTON, J.—This suit was originally before a justice of the peace for a balance of seventy-five dollars, alleged to be due on a settlement between the parties. The plaintiff had a judgment before the justice, and again in the circuit court. As usual, where plaintiff and defendant are both witnesses, there was some discrepancy in the testimony, and the only question for our consideration is the propriety of the instructions.

The dispute between the parties was as to the balance due plaintiff on several notes given by defendant to him. The defendant had taken up six of the notes, and sent \$150 to plaintiff, for which he had plaintiff's receipt, and had then given his note for \$100, as the balance still due plaintiff. Afterwards, the defendant insisted that this note

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for \$100 was a mistake—that the \$150 already sent to plaintiff had overpaid all the legitimate interest on the notes by \$85. The plaintiff, however, had his notes and calculations on them, and suggested that the matter be left to one J. C. Couch, as arbitrator, which was agreed to, and Couch called in, and both plaintiff and defendant gave him a full statement of the points of difference between them. Couch declined to arbitrate, unless another person was associated with him, and thereupon one Howell was agreed on. The two arbitrators took the notes and papers, and Couch communicated to Howell what had been stated to him by the parties, and they both agreed that, without examining the calculations on the notes, they would award the plaintiff \$75. This was done, and the plaintiff being informed of their decision, returned the \$100 note to defendant. Whether the defendant promised to pay the \$75 or not, is disputed—but the first instruction asked by the defendant himself puts the case as favorably to him as could be reasonably expected, and that instruction was given, as well as the 4th, with some modifications. The instructions given by the court put the case fairly before the jury.

Our statute in regard to arbitrators and awards, has nothing to do with this case. Indeed, it matters not whether the arbitrators did right or wrong in not examining or calculating the notes and interest—though I do not see that they might not have been satisfied from the statements of the parties themselves, without going into any such examination. At all events, when the award was made and the parties assented to it, the plaintiff giving up his \$100 note and the defendant receiving it, that was an end of the matter.

Judgment affirmed. The other judges concur.

**AFFIRMED.**

Eoff v. Thompkins.

*Eoff, Plaintiff in Error v. THOMPKINS.*

**Devisee and Executor: EJECTMENT.** Under the administration act, (Wag. Stat., 89, §§ 48, 49,) a devisee of real estate cannot maintain ejectment against one holding under a lease made by the executor of the devisor in obedience to an order of the probate court. The act expressly authorizes the executor to lease the real estate of his decedent, when so directed by competent authority, and the right of the devisee is subordinate to this.

*Error to St. Louis Court of Appeals.*

Ejectment, brought by plaintiff as devisee under the will of Mrs. Long. Defendant was tenant in possession and had leased the premises in controversy from one Bush-ile, executor of Mrs. Long. The lease was made under the order of the probate court of St. Louis county.

*John Burke* for plaintiff in error

An executor, as such, cannot maintain or defend in ejectment. *Burdyn v. Mackey's ex'r*, 7 Mo. 374. He takes no interest in the real estate of his testator, but the naked power to sell to pay debts after the personal assets are exhausted. *Aubuchon v. Lory*, 23 Mo. 99; *Chambers v. Wright*, 40 Mo. 482; *Foltz v. Prouse*, 17 Ill. 487; *Gibson v. Farley*, 16 Mass. 280; *Stinson v. Stinson*, 38 Me. 593; *Mills v. Mer-ryman*, 49 Me. 65; *Smith v. Bland*, 7 B. Mon. 21; *Kimball v. Sumner*, 62 Me. 305; *Lucy v. Lucy*, 55 N. H. 9.

SHERWOOD, C. J.—The circuit court held that inasmuch as the probate court had ordered the executor to lease the land in question, and the executor complied with the order, this was a bar to the ejectment prosecuted by the plaintiff devisee under the will of the former owner.

We are clear that this ruling, affirmed as it was, both in general term and by the court of appeals, was correct. The statute expressly authorizes executors, &c., to lease the real estate of their decedents, when so directed by compe-

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tent authority, and to receive and collect the rents. 1 Wag. Stat., p. 89, § 48.

When a man dies, his real estate, though technically descending to his heirs, does so *cum onere*—immediately comes into the custody of the law, to be administered in due course. If the above provision is possessed of any effective meaning or force, the right of heirs or devisees is most manifestly subordinated to that obtained under the order of the probate court. As well might the heirs of a deceased bankrupt claim the right of possession of his realty, as the plaintiff in the present instance. And the fact that the realty is transferred to the assignee in bankruptcy by operation of law, by no means impairs the analogy between the two cases, since after satisfying the demands of the bankrupt's creditors, if any real estate be left, it would go to his heirs, and so it would also, under our law if not needed in the progress of administration. But until this fact be ascertained, after an order for leasing be made, the whole estate is in *custodia legis*, there to remain till, as stated in section 49, the court, satisfied that the real estate "need not be sold or leased," orders the executor to deliver possession to those entitled thereto. And our view of the end designed to be accomplished in this regard by the above mentioned sections, finds abundant confirmation in that provision of the partition act, prohibiting partition of land from being fully consummated until the estate has been settled, or the court satisfied that there is ample property *aliunde* to satisfy all claims, &c. 2 Wag. Stat., p. 973, § 51. The case of *Burdyne v. Mackey, ex'r*, (7 Mo. 374,) is not in point, for there the principal question was whether an executrix, as such, could maintain ejectment; and it was properly held she could not. But there was no order to lease made in that cause, and so the ability of the executrix to resist ejectment under such an order, was not passed upon. Under the act of January 12th, 1822, an administrator was authorized, under the order of the county court, to lease out the real estate of an intestate, dying without



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known heirs in the State. And it was held at an early day (*Rector v. Ranken*, 1 Mo. 371), that an administrator, under such circumstances, might recover the rents in *assumpsit*. Now, the right to thus recover must inevitably be based on the validity of the lease, and this in turn rests upon the validity of the probate command to that effect.

In order to successfully lease, the administrator must be able to take and yield possession to his lessee. The ability of the administrator to do this, is utterly incompatible with the right of the heir or devisee during the continuance of the lease, to maintain ejectment.

Judgment affirmed. All concur.

AFFIRMED.

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THE STATE ex rel. MERRILL, *Appellant* v. BURNS *et al.*

**Appeal:** FINAL JUDGMENT. An appeal from an order setting aside a final judgment is premature. It should not be taken until another final judgment has been entered in the cause.

*Appeal from Schuyler Circuit Court.*—HON. JOHN W. HENRY, Judge.

C. E. Vrooman, F. T. Hughes, Harrington & Cover and Higbee & Shelton for appellant

McGoldrick & Caywood for respondents, cited *Martin v. Henley*, 13 Mo. 312; *Leahey v. Dugdale*, 41 Mo. 517.

HOUGH, J.—At the August term, 1874, of the Schuyler circuit court, in a suit brought by plaintiff against the defendants upon an administrator's bond, wherein the defendant, Burns, was principal, and the defendant, Grant, was surety, final judgment was rendered in favor of the plaintiff, and against the defendant, Grant. At the next term of said court, the defendant, Grant, filed a motion to set

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aside the judgment rendered against him for alleged irregularity in the rendition thereof, and for other causes, which motion was sustained by the court. Thereupon the plaintiff took the present appeal.

When a judgment is arrested, or set aside, no appeal can be taken until another final judgment is entered in the cause. In the present case, the plaintiff, in order to have the action of the trial court, in setting aside a judgment rendered by it at a previous term, reviewed by this court, should have refused to proceed further with the cause, and permitted final judgment to be rendered against him. *Garesche v. Emerson*, 31 Mo. 258; *Gilstrap v. Felts*, 50 Mo. 431; *Bowie v. City of Kansas*, 51 Mo. 459.

The appeal is manifestly premature, and must therefore be dismissed. The other judges concur, except Judge HENRY, who did not sit.

APPEAL DISMISSED.

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ATLANTIC & PACIFIC R. R. Co., *Appellant*, v. CITY OF ST. LOUIS *et al.*

**2 Corporate Existence proved by Legislative Recognition.**

The State having sold a railroad to certain individuals, requiring them to form themselves into a corporation, and the legislature having, in several subsequent acts, recognized the existence of the corporation; *Held*, that its existence could not be questioned by third parties, and such recognition dispensed with other evidence of the fact.

- 2 Corporation Deed.** A deed from one corporation to another, is *prima facie* valid when signed by the proper officers, and under the corporate seal of the grantor, if, by law, the grantor has power to sell, and the grantee, to purchase. It devolves upon any one denying the validity of the deed on the ground that the stockholders have not assented to its execution, to prove that fact.

- 3. Railroad Consolidation:** STATUTE CONSTRUED. The act of March 15th, 1871, (Sess. Acts, p. 66), left it optional with the Atlantic & Pacific Railroad Company, and the South Pacific Railroad Company, to consolidate, or not, as they chose. Failure of the companies to

file with the Secretary of State the certificate required by the second section of that act, did not affect the validity of the conveyance by which, before the passage of the act, the South Pacific Company transferred to the other all its property, rights and franchises.

4. **Right of Individuals and the State to dispute the Exercise of Corporate Franchises.** Individuals may resist the condemnation of their lands for a right of way for a railroad, after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road after the expiration of that time, over a right of way acquired before the expiration. A city is an individual within the meaning of this rule, so that where a railroad company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets, on the ground that the time limited by charter for the completion of the road has expired. The State alone can proceed against the company to arrest the work on that ground.
5. **Branch Railroads: CHARTER LIMITATIONS AS TO TIME OF BUILDING.** A railroad company was authorized, by its charter, to build a main line and branches, and was required to complete its road within seventeen years from the date of the charter; *Held*, that this limitation did not apply to the building of branch roads, at least so as to prevent the company from building a branch road over a right of way acquired before the expiration of that period.
6. **Branch Railroads.** A railroad company having a power to build branches, may, under that power, build a line commencing near one of its termini, and running in the same general direction with the main line, so as to form practically an extension of the main line.
7. **Estoppel against Exercise of Corporate Powers: MUNICIPAL POWER OVER STREETS: LICENSE.** A railroad company which has, by its charter, a general power to build its road along or across the streets of a city, is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city authorities, an ordinance permitting it to lay and use a track on that street for a limited time, and has actually laid and used it, as permitted by the ordinance. The city has no power to authorize the use of any street for a railroad. Such an ordinance is, therefore a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license.
8. — : — : —. If a railroad company, having built a track upon a street of a city under a license from the city, subsequently tears up the track and surrenders possession of the street to the city, the fact that it has once accepted such license will not estop it from

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asserting a power to build on that street, which was given by its charter, and was in existence when it accepted the license.

9. **Railroads: ACCEPTANCE OF STATUTORY PRIVILEGES.** An act passed in 1864, (Sess. Acts, p. 478,) authorized several railroad companies to connect their lines, and for that purposes granted them certain privileges. No time was prescribed within which the companies should accept the act. The connection was made in 1873; *Held*, that this was an acceptance of the act, and that the acceptance was in time.
10. **Section 27, Art. 4, Constitution of 1865**, which provided that "the General Assembly shall not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town," was prospective in its operation only, and did not repeal an act in force at the time of the adoption of the constitution, giving such a right.

*Appeal from St. Louis Court of Appeals.*

This was a suit for an injunction brought by the Atlantic & Pacific Railroad Company against the city of St. Louis, its mayor, city engineer and other officers, agents and servants, to restrain them from tearing up or otherwise interfering with a railroad track which had been laid down by the plaintiff company in Poplar street and on the Levee in that city. Plaintiff claimed that it derived the right to lay and maintain the track from the charter of the Pacific Railroad Company, through a lease which it had taken of the road, property and franchises of that company. The charter of that company, granted by the Legislature in 1849, contained, among others, the following provisions:

Sec. 7. Said company shall have full power to survey, mark out, locate and construct a railroad from the city of St. Louis to the city of Jefferson, and thence to some point in the western line of Van Buren county, in this State; \* \* and may extend branch railroads to any point in any of the counties in which said road may be located.

Sec. 11. Said company may build said road along or across any State or county road, or the streets or wharves of any town or city, and over any stream or highway.

Sec. 12. Said company shall commence the construc-

tion of said road within seven years, and shall complete the same within ten years thereafter. Sess. Acts 1849, pp. 220, 221.

Section 7 was afterwards amended so as to read as follows: Said company shall have full power to survey, mark out, locate and construct a railroad from the Mississippi river or any other point in the city of St. Louis on any route the said company may deem most advantageous, to any point on the western line of the State, which the company may select. Sess. Acts 1850-51, p. 272, § 9.

In 1852 further amendments to the charter of said company were made by an act, of which section 1 vested in the Pacific Railroad Company the title to all the lands granted by the United States to the State of Missouri for railroad purposes, by the act of Congress of June 10th, 1852, so far as the same were applicable.

Section 2 authorized said company to lay out, construct and maintain a line of railway or branch railroad from any point on the main line of the Pacific railroad east of the Osage river, to any point on the western boundary of the State south of the Osage river, which the company might select.

Section 3 required the company to proceed as soon as practicable to locate said southwestern line or branch railroad, and to locate and select the lands granted by Congress.

Section 4 required the company to apply said lands to the construction of the main line from its commencement in the city of St. Louis to the point of divergence of the southwestern branch, and to the southwestern branch.

Section 9 authorized the Governor to issue bonds of the State to be used in building said branch road, and reserved to the State the right to sell the road in case of default in the payment of either principal or interest of said bonds. Sess. Acts 1852, p. 10.

In 1864 the General Assembly passed an act authorizing the Pacific and other railroads to connect their lines



in the county of St. Louis, and to lay switches to unload freight into the St. Louis Grain Elevator, whenever the boards of directors of said roads should agree and find it to the interests of their roads, and for that purpose authorized them to lay a track on the Levee or Front street, and authorized them to condemn the right of way over any land necessary for such tracks in conformity with their respective charters.

Under these several acts the Pacific Railroad, prior to 1870, had built and operated a main line from Seventh street, in the city of St. Louis, to Kansas City, and a branch from Franklin, a station on the main line thirty-five miles west of St. Louis, in a southwestwardly direction towards Springfield. Bonds had been issued by the State under the act of 1852, to aid in the construction of this southwest branch. The company having made default in the payment of interest due upon these bonds, the State, in 1866, declared a forfeiture of the branch road and all the franchises, privileges and rights appertaining to the same, (Sess. Acts 1866, pp. 107, 115), and ordered the road to be sold, the purchaser being required to complete the road by way of Springfield to the western boundary of the State. (Ib., p. 111, § 7). Under this act the road was sold to Fremont, and the name was changed to the Southwest Pacific Railroad Company.

In 1868 this road, and its franchises, were again declared forfeited to the State, and were sold by the State to Kingsland and certain other persons, who were required to form themselves into a body politic and corporate under the general laws of the State; said corporation, when formed, to be known as the South Pacific Railroad Company. (Sess. Acts 1868, p. 118). This company completed its road as far as Springfield.

On the 27th of July, 1866, the plaintiff, the Atlantic & Pacific Railroad Company, was chartered by an act of Congress to build a railroad from Springfield, Missouri, to the Pacific Ocean. 14 U. S. Stat. at Large, 292.

By the second section of the act, a portion of the public lands were granted to the company to aid in the construction of the road, and it was provided, that if the route of the road should be found to be upon any other railroad route, to aid in the construction of which lands had been previously granted by the United States, as far as the routes were upon the same general line, the amount of land previously granted should be deducted from the amount granted by the act; provided that the company receiving the previous grant might assign their interest to the Atlantic & Pacific company, or might consolidate, confederate and associate with said company; and it was further provided that the Atlantic & Pacific company might avail itself of any power or franchise that might be conferred on it by any State. At that time the Southwest Branch was entitled to the land grant conferred by the act of Congress of June 10th, 1852, and the act of the Legislature of December 25th, 1852.

The Atlantic & Pacific company proceeded, under its charter, to build its road from Springfield southwestwardly into the Indian Territory. On the 26th of October, 1870, the South Pacific Company sold to the plaintiff the road from Franklin to Springfield, with all its rights, privileges and franchises, and made a deed to the same under the seal of the corporation, and signed by the proper officers. It did not appear at the trial whether the stockholders of the South Pacific company assented to the sale or not.

On the 29th of June, 1872, the plaintiff company, pursuant to the provisions of the act of March 24th, 1870, took a lease of the Pacific railroad, with all its property, rights, privileges and franchises. The latter company had at first located its depot in the city of St. Louis at Fourteenth street, fourteen blocks west of the Mississippi river. It afterward extended its road seven blocks eastward, and nearer to the river, and built its depot at Seventh street. This was the eastern terminus of the road for more than ten years prior to 1870. In that year the Pacific railroad

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solicited and obtained from the city council of the city of St. Louis an ordinance granting permission to the company to lay and maintain a track branching off from its main track at a point near Ninth street, a few hundred feet west of its Seventh street depot, and running along Poplar street eastwardly to the Levee or Front street, at the Mississippi river, and thence northwardly along the Levee to the St. Louis Grain Elevator, a distance of nearly a mile. The track was built accordingly. The general direction of the Pacific railroad is from east to west. Between Ninth and Seventh streets the main track and Poplar street track are only a few feet apart.

This ordinance provided that this track should be removed at the end of two years. When the two years were about to expire, the company requested the city government to extend the time for one year longer. The city council thereupon passed an ordinance extending the time. This ordinance, however, contained provisions to which the company objected, and plaintiff, having in the meantime become lessee of the road, notified the city that it declined to accept the ordinance, tore up the track in several places, and discontinued its use.

After the lapse of three weeks it repaired the track, and began to use it again. The city council thereupon, passed an ordinance declaring the track a nuisance, and making it the duty of the executive officers of the city to remove it in case the company failed for thirty days to remove it themselves. The city engineer, acting under the orders of the mayor, was proceeding to execute this ordinance, when plaintiff sued out a preliminary injunction in the circuit court. On a final hearing, this was made perpetual by the court at special term, and that decree was affirmed in general term. On appeal to the Court of Appeals there was a reversal, and plaintiff appealed to this court.

*Thomas J. Portis* for appellant.

1. The Pacific railroad was authorized to build, maintain and operate this track at the time and place it did. Sess. Acts 1849, p. 219, § 11; Acts 1851, p. 268, § 9; Acts 1863, Adj. Sess. p. 478, §§ 1, 2; *Ib.*, p. 50, § 14. *Porter v. N. Mo. R. R.*, 33 Mo. 137; *Lackland v. N. Mo. R. R.* 34 Mo. 259.

2. The fact of the company laying its track according to the ordinance of 1870, did not amount to an acceptance of a license, or a waiver by the company of the rights secured by its charter. The streets belong to and are in possession of the State and all the citizens of the State—one person as much as another owns and has possession of the streets in question, and has always had. The State, by its Legislature, had at the time the charter of the Pacific railroad was enacted absolute control and disposition of said streets, and said charter is a binding contract which cannot be altered by either laws or constitutions. The Pacific railroad corporation was one of the citizens of the State which, in common with all the rest, including the city of St. Louis, owned and possessed these very streets, and had as much right to enter upon them, and carry on its business there, as any other person. The only condition it had to observe was the same all were bound by, viz: not to monopolize the streets. At the time the city claims to have granted a license to the company to construct its railroad along said streets and to carry on its business there, it had the same right to the possession, and the very same possession of said streets as the city itself. The city could not license the company to enjoy that which it already had—to occupy that which it already had a right to occupy—nor could it prevent such enjoyment and occupation. The company did not acquire under and by the said ordinance any power or right which it did not have before under its charter, and said ordinance was of no force whatever.

Therefore it cannot be claimed that said company is estopped or in any manner prejudiced as to its legal rights by that ordinance or by anything done by itself or said city. The relation of licensor and licensee did not exist between the city and the company, and could not under the laws of this State and the facts in this case. The company did not enter into possession, or remain so, under a license from the city, but being in possession under the authority of the State, it made an agreement with the city as to the mode of operating its railroad. The ordinance was a nullity so far as it undertook to do more than that, the city council thereby assuming judicial functions which did not belong to them. *Yates v. Milwaukee*, 10 Wall. 497; *Sloan v. Pacific R. R.*, 61 Mo. 24.

3. Being a nullity, the men engaged in tearing up this track were without authority, their action was illegal, and they were mere trespassers, and should have been restrained, even if the court should believe that the plaintiff was acting without a warrant of law in the operation of the road, since the road was not an obstruction or a nuisance in fact. Again, the company abandoned the use of the track for weeks, and notified the city of its intention to relay the track under the provisions of its charter, and of its refusal to accept its ordinance. Again, the city itself tore up the track afterwards and ousted the company, and, therefore, the company was at full liberty to lay its track thereafter under its charter.

4. The privilege to operate a line of railway over and through a street, is a franchise, and is not lost nor forfeited by the neglect of the company to complete the work within the time limited by the conditions of the grant. The most that can be said of it is that the limitation of time is a condition subsequent upon the non-performance of which the estate vested is liable to be divested. But an omission to perform, or a breach of a condition subsequent, does not, *ipso facto* determine the estate. It merely exposes the estate to be determined at the election of the grantor.



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Upon the performance, *vel non*, of a condition subsequent, the company has a right to be heard, and in a direct proceeding instituted for the very and special purpose of having a forfeiture adjudged. Not even the State can avail itself in a collateral proceeding of the non-user of a franchise, or not even an ordinary grantor can thus avail himself of the breach of a condition subsequent. *Brooklyn Central R. R. v. City R. R.*, 32 Barb. 358. Thus it must be held that if the railroad track in question is a prolongation and extension of the main line, and the time within which the company had authority, under its charter, to make such prolongation or extension had expired, the city of St. Louis could not complain, and could not maintain a legal proceeding on account thereof. Much less could it summarily destroy the road by force, and, having undertaken to do so, and still threatening to carry out such illegal purpose, this court will make the injunction perpetual.

5. The question as to what property, quantity of land, or what franchises the respondent could receive or hold, cannot be raised or determined in a suit with a third person, or stranger to the conveyance. *Chambers v. St. Louis*, 29 Mo. 576; *Laud v. Coffman*, 50 Mo. 252; *St. Louis v. Shields*, 62 Mo. 247; *Runyan v. Coster*, 14 Pet. 131; *Burns v. Railroad*, 9 Wis. 450; *Baird v. Bank*, 11 Serg. & R. 411; *Bank v. Poitiaux*, 3 Rand. 136; *Goundie v. Noth. W. Co.*, 7 Pa. Stat. 233; *Ang. & Ames on Corp.*, §§ 151 to 154.

6. If at the time the lease of the Pacific railroad to the Atlantic & Pacific Railroad Company was made, the latter was engaged in using and operating as its own, under color of law, a connecting railroad, the same being a railroad from Franklin to Vinita, neither the Pacific railroad nor the public at large could inquire into the title of the Atlantic & Pacific Railroad Company to a fractional part of that road, much less could a wrong-doer make such an inquiry. In such a case, proof that the corporation was acting as such under legislative sanction, is sufficient evidence of right, except as against the State, and private

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parties cannot enter upon the question of regularity. Cooley's Const. Limit. 254; *Kayser v. Trustees of Bremen*, 16 Mo. 88; *State v. Carr*, 5 N. H. 367; *Prest. and T. of Mendota v. Thompson*, 20 Ills. 197.

7. The Pacific Railroad Company was authorized to build this as a branch road. Sess. Acts 1849, p. 219, § 7; Acts 1851, p. 268, §§ 9, 11. The power given by the charter to build along and across public streets applies as well to the branches as to the main line. *Han. & St. Jo. R. R. v. Muder*, 49 Mo. 165; *Cleveland R. R. v. Speer*, 56 Penn. St. 325; *Mayor v. Penn. R. R. Co.*, 48 Penn. St. 355; *Philadelphia R. R. Co. v. Williams*, 54 Penn. St. 107; *Black v. Philadelphia*, 58 Penn. St. 252.

8. The public necessities required the laying of this track. This is recognized by the act of February 15th, 1864. This necessity alone authorized the company to lay it. *Miss. & Tenn. R. R. Co. v. Devaney*, 42 Miss. 555; *Carrollton Rwy. Co. v. Second Municipality*, 1 La. Ann. 128; *Knight v. Carrollton Rwy. Co.*, 9 La. Ann. 284; *Railway ex parte*, 2 Richardson 434; *So. Car. R. R. Co. v. Blake*, 9 Rich. 229.

9. Again, the power given by the 12th section of the original charter to construct and keep such turnouts, gates, depots \* \* and other buildings, machinery and fixtures as may be necessary, authorized the laying of this track as a necessary spur or appendage. The power of building side tracks is a continuing one and may be exercised whenever the necessities of the business require it. *Cleveland, etc. R. R. v. Speer*, 56 Penn. St. 335; *Han. & St. Joe. R. R. v. Muder*, 49 Mo. 165; *Chicago, etc. R. R. v. Wilson*, 17 Ill. 123; *Low v. Galena, etc. R. R.*, 18 Ill. 324; *Mayor v. Penn. R. R. Co.*, 48 Penn. St., 357; *Toledo R. R. v. Daniels*, 16 Ohio St., 390; *State v. Commissioners*, 23 N. J. L. 510; 1 La. Ann. 128; *Eldridge v. Smith*, 34 Vt. 484.

10. This track did not exceed in dimensions a spur-track or switch, such as is necessary at the terminus of a railroad. It extended from Seventh and Poplar to the

Levee and Poplar, a distance of seven squares, or about 700 yards, and was used for shipping grain to the St. Louis Elevator. The construction of such switches, and of even greater length, is authorized without any express power, but under the general right to build a railroad, even after the time to complete the road has expired. *Protzman v. Ind. R. R.*, 9 Ind. 469; *Brainard v. Clapp*, 10 Cush. 6; 16 Ohio St. 390; 17 Ill. 123; *Coster v. N. J. R. R.*, 24 N. J. L. 730; 2 Richardson 434; 9 Richardson 228.

11. Again, the act of February 15th, 1864, authorized the laying of this track. It empowered the several companies named to connect their lines in the manner granted in their respective charters. This authorized the Pacific company to use the power given in its charter of running over the streets of the city. This act was not repealed by Sec. 27, Art. 4, of the constitution of 1865. That section simply means that after 1865, no such special act shall be passed as this act of 1864. The company accepted the provisions of the act by doing precisely what it authorized them to do. This was sufficient acceptance. *Cooley's Const. Limit.* 254; *People v. Beigler*, Hill & Denio, (N. Y.) 135; *Jones v. Dana*, 24 Barb. 398; *Merchants' Bank v. Harrison*, 39 Mo. 433; *Gaines v. Bank of Miss.*, 12 Ark. 769.

12. The South Pacific company having sold out to the Atlantic & Pacific, the latter company became a connecting road with the Pacific at Franklin, (*Railroad Co. v. Railroad Co.*, 6 Am. Law Reg., N. S., 231) and entitled under the act of March 24th 1870, to take a lease of the Pacific, unless the defendant can show that the deed of the South Pacific to the Atlantic & Pacific was void. That deed passed the title irrevocably as against all persons except the State, even if the stockholders did not ratify it. *Farmers Loan & T. Co. v. Curtis*, 3 Seld., (7 N. Y.) 470. But here it is not even a question whether it can be inquired into, but whether the plaintiff must in the first instance affirmatively show such assent, notwithstanding it is manifest that the state

and stockholders have not objected, although the deed has not been in existence over three years.

13. There was sufficient proof of the existence of the South Pacific company. To prove the existence of a corporation it is only necessary to show that there is a law authorizing such a corporation to be formed, and then to prove that it did act as such corporation. The proof of these two things makes out a *prima facie* case. Cooley's Const. Limits. (3 Ed.,) 254; *People v. Beigler*, Hill & Denio, (N. Y.) 135; *St. Louis v. Shields*, 62 Mo. 247; or to show general reputation that it is a corporation; and the same rule applies to corporations formed under general laws, and to corporations formed under the laws of other States. *State v. Fitzsimmons* 30 Mo. 240; *Holmes v. Gilliland*, 41 Barb. 569. Proof of an act of the Legislature authorizing such a corporation, and of the existence of two officers claiming to act for such corporation, establishes the existence of the corporation. Oral evidence that the corporation is using the franchise which the act of the Legislature gives them, proves the existence of the corporation. *Wilmington R. R. v. Saunders*, 3 Jones (N. C), 127; *Farmers' and Drovers' Bank v. Williamson*, 61 Mo. 259; *Dooley v. Wolcott*, 4 Allen (Mass.) 406; *Jones v. Dana*, 24 Barb. 397; *Merchants' Bank, v. Harrison*, 39 Mo. 433.

14. The existence of the South Pacific Railroad Company having been shown, and its deed to the Atlantic & Pacific Railroad Company having been regularly executed, bearing the signatures of its president and secretary, with its corporate seal affixed, it is unnecessary to show that this deed was executed with the consent of the stockholders, especially after the lapse of over three years without any objection having been made by any one. *Herman on Estoppel*, 510, § 540; *Swartz v. Page*, 13 Mo. 604; *People v. Law*, 34 Barb. 494; *Yates v. Milwaukee*, 10 Wall. 497; *Musser v. Johnson*, 42 Mo. 74.

*Samuel Reber* for respondents

1. The right to lay the track on Poplar street is claimed under the charter of the Pacific railroad, amended by the act of March 1, 1851. I concede that originally that company had the right to lay its track from the Mississippi river, or any other point in the city of St. Louis westward, to the western boundary of the State. But having located its eastern terminus at Seventh street, and kept it there for many years, it exhausted its power and could not afterwards extend its road further east. *Brooklyn C. R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358; 1 Redfield Railways, part 4, § 105, p. 410, (5th Ed.); 1 American Railway Cases 150; *Morris & E. R. R. Co. v. Central R. R. Co.*, 31 N. J. 207.

2. It is claimed that the road on Poplar street is a branch, and that by charter it had a right to build a branch. It is exceedingly difficult to affirm that the road on Poplar street, which was a mere continuation of the main line eastward and in the direction of the main line, was a branch; but waiving this, the road had to be completed in seventeen years, and it was not competent to build a branch after the expiration of that period. *Peavy v. The Calais R. R. Co.*, 30 Maine 498; *Morris & E. R. R. Co. v. Central R. R. Co.*, 31 N. J. 207.

3. It is said the Poplar street track is a spur or appendage, but if so, it should have been built within the limited time above. 31 N. J. 207; but it is an abuse of terms to call it a spur or appendage.

4. The act of February 15th, 1864, never was accepted, and the track was not built under its authority, but expressly under authority of the city ordinance. The Poplar street track, then, was not laid under authority of any act of the Legislature, but solely and expressly under authority of the ordinance No. 7,329; and the Pacific Railroad Company took only such title to the street as the ordinance gave, and that was a simple license to use and occupy it until January 1st, 1872. Having entered upon



and occupied the street under the city, the Pacific could not retain possession under claim of some other title or authority. The company became tenant or licensee of the city, and is estopped from denying its title; and if it had any other title, it must surrender possession before it could assert the title. Bigelow on Estoppel, 372, 386, 387, 384, 401, 412. The plaintiff, apparently with a view to show that the Pacific had surrendered the Poplar street track about the first of January, 1872, introduced evidence to show that about that time the Pacific made two or three small breaks in that track, and ceased to run cars on it for a short time; but it suffered the body of the track to remain unbroken, and gave no notice of its intention to surrender, and soon after repaired the track and ran its cars over it. It is true, that the Pacific, on the 10th of February, 1872, gave the city notice that it declined to accept the ordinance of January 26th, 1872.

5. If the Pacific had a right to build a track on Poplar street in 1870, it never conveyed the right to the plaintiff.

a. Its right was not transferable or vendible. It was a mere personal privilege, a license to use the street, and no property in it. Its right to the track on a public street was very different from its right to the track when it owned the soil. There it had a vendible estate. A license is personal and cannot be sold or transferred. *McPheeters v. Merimac Bridge Co.*, 28 Mo. 465; *People v. Duncan*, 41 Cal. 507. Its right was a mere license, whether it occupied the street under the authority of city ordinance, or under the acts of the General Assembly. The lease of the Pacific company to plaintiff was therefore inoperative to convey the right to use this street.

b. It was inoperative for a further reason. The plaintiff and the Pacific were not connecting or continuous roads, and the lease was therefore, not authorized by the act of March 24th, 1870. A railroad corporation cannot convey or lease its property and franchises without express

authority. 1 Redfield on Railways, (3 Ed.) 589, § 142; Ib., (5 Ed.) 410, § 105.

The plaintiff and Pacific Railroad Company were not connecting roads at the date of the lease or since, because the plaintiff had no title to the South Pacific Railroad, which extended from Franklin to Springfield. The plaintiff is a corporation created by act of Congress, with power to build and own a road from Springfield westward, but not eastward of Springfield. But it is claimed that the South Pacific Railroad Company was a corporation and owned a road from Springfield eastward to Franklin, and that plaintiff acquired the franchises and property of the South Pacific by virtue of the so-called deed of consolidation of the 26th of October, 1870, and of the confirmatory act of March 15, 1871. (Acts of 1871, p. 66.) This deed is inoperative for these reasons:

1. The act of March 24, 1870, under which it was made, requires the assent of the stockholders, and no assent is shown. The confirmatory act of March 15, 1871, does not confirm the deed, because the recitals of the first section are no evidence of the facts recited. (Marshall, C. J., says the Legislature can make laws but not facts.)

2. Because, also, the South Pacific could not transfer its property and franchises without express authority.

3. Because, also, the companies failed to file the certificate in the office of the Secretary of State required by the second section of the act.

4. Because, also, the deed being void for want of the assent of the stockholders, the constitution, Art. 4, Sec. 27, forbids any legislative confirmation.

5. Because the act attempts, in effect, to create a corporation to own and manage a railroad from Springfield to Franklin, and the Legislature is prohibited from creating any such corporation. The Legislature could no more add to the powers of the plaintiff (which is not a domestic or Missouri corporation) than it could create a corporation out and out.

To this I am answered by appellant's counsel that a deed under the corporate seal and signatures of the proper officers, is *prima facie* evidence that the officers did not exceed their authority, and the burden of showing that they did is on the other side. This doctrine is not disputed, where the corporation has the right to make the conveyance, either by express grant or by implication from the nature of its business. But when the corporation has no power to make the conveyance, except on special conditions, compliance with those conditions should be shown. See *St. Louis Public Schools v. Risley*, 28 Mo. 419; *Swartz v. Page*, 13 M. 610; *Shrewsbury B. & R'y Co. v. N. W. R'y Co.*, 6 H. L. Cases 135; 9 Exch. 75, 84.

HENRY, J.—The principal questions for consideration are.

1st. Had the Pacific Railroad Company the right to lay its track along Poplar street at the time it was placed there by the company?

2d. If so, was that right acquired from the State, or from the city of St. Louis?

3d. Did the Atlantic & Pacific Railroad Company, under the lease from the Pacific Railroad Company, acquire the property and franchises of the latter; and if the Pacific company had the right to lay, maintain and operate said track, was that right acquired by the Atlantic & Pacific company under said lease?

This last question will be considered first, as it involves the capacity of the Pacific company to convey, and of the Atlantic & Pacific to acquire and hold under such conveyance, the property and franchises of the Pacific company. The Pacific Railroad Company was incorporated by an act of the General Assembly of this State, approved March 29th, 1849, and by the 7th section of the act was empowered to construct a railroad from the city of St. Louis to Jefferson City, and thence to some point on the western line of Van Buren county in this State, and by the 11th

section was authorized to build said road along or across the streets of any city. By the 7th section it was authorized to extend branch railroads to any point in any of the counties in which said road might be located.

By an amendatory act, approved March 1st, 1851, the 7th section of the original act was so amended as to authorize said company to construct a railroad from the Mississippi river, or any other point in the city of St. Louis, on any route the company should deem most advantageous, to any point on the western line of the State, with power to construct lateral or branch railroads to any point or points in this State not exceeding fifty miles from its main line.

By an act of the General Assembly, approved December 25th, 1852, the said company was authorized to construct a line of railroad from any point on its main line east of the Osage river, to any point on the western boundary line of the State south of the Osage river. Under this act the company located a road from Franklin to the western line of the State near Neosho. By the act of 1866, this road was forfeited to the State, and sold to John C. Fremont, and the name of the road changed to "the Southwest Pacific Railroad Company."

By the act, approved March 17th, 1868, (Sess. Acts 1868, p. 118,) the road and its franchises were again declared forfeited to the State, and by the State sold to the South Pacific Railroad Company, or rather, to individuals therein named, who were authorized to organize that company.

There is no direct evidence that such a company was ever organized, but by an act of our Legislature, approved March 10th, 1869, the existence of that company was recognized, by directing the Governor, on application of the South Pacific Company to cause any number of said South Pacific railroad construction bonds, not exceeding one million of dollars, to be certified and delivered to some respon-

1. CORPORATE EX-  
ISTENCE PROVED  
BY LEGISLATIVE  
RECOGNITION.

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sible bank or banks in New York or Boston, to the credit of the State Treasurer, which said company was authorized to negotiate or hypothecate in payment for iron for the construction of the road; also, by an act of May 24th, 1870, which required the State Treasurer to pay to the South Pacific company all money received by him on account of the sales of any of the lands by said Fremont, &c., and providing that the receipt of the president of said company should be a sufficient voucher for the same; also, by an act, approved March 24th, 1871, by provision made for its consolidation with the Atlantic & Pacific Railroad Company. The State having sold the Southwest Pacific railroad to individuals authorized to organize the South Pacific company, and afterwards, repeatedly by acts of the General Assembly recognized the existence of the corporation, it cannot now be questioned by third persons—even if the State could do so.

By an act of the General Assembly, approved March 24, 1870, it was provided: "That any railroad company organized in pursuance of the laws of this, or any other State, or of the United States, may lease or purchase all or any part of a railroad, with all its privileges, rights and franchises, real estate and other property, the whole or a part of which is in this State, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this State."

By section 3 of the act of Congress incorporating the Atlantic & Pacific Railroad Company, it was provided: "That if such route (of the Atlantic & Pacific road) shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act, provided that the railroad company receiving the previous grant of land, may assign their interest to said Atlantic & Pacific Railroad Company, or may consolidate, confederate



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and associate with said company upon the terms named in the first and seventeenth sections of this act."

That the routes of the South Pacific and of the Atlantic & Pacific were upon the same general line, will not be denied, and as the government had granted lands to aid in the construction of the South Pacific, it was of the class of roads which, by the third section of the act of Congress, the Atlantic & Pacific was authorized to purchase, and by the act of 24th of March, 1870, *supra*, the South Pacific was empowered to sell, and the Atlantic & Pacific to purchase and hold all the rights, franchises and property of the South Pacific company, because the two roads connected at Springfield, Mo.

By its deed, dated 21st day of October, 1870, the South Pacific company conveyed to the Atlantic and Pacific, its  
2. CORPORATION DEED. railroad, completed and uncompleted, and all of its privileges, rights, franchises and property of every description. As the one company had the right to sell, and the other to purchase, it follows that the deed, under the seal of the corporation and signed by the proper officers of the company, is *prima facie* evidence that the officers did not exceed their authority, and if the assent of the stockholders to such conveyance was not had, it devolved upon the defendants to show that fact.

Having by purchase acquired all the rights, franchises and property of the South Pacific company, the Atlantic & Pacific acquired a right to lease or purchase the Pacific railroad under the act of March 24th, 1870. This was a right which the South Pacific had, and all its rights and franchises were conveyed to the Atlantic & Pacific. The Atlantic & Pacific and the South Pacific road became one continuous road, and connected at Franklin with the Pacific.

Respondents contend that the deed was inoperative, because the companies failed to file in the office of the Secretary of State the certificates required  
3. RAILROAD CONSOLIDATION: statute construed. by the second section of the act of March

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15th, 1871, (Sess. Acts 1871, p. 66). That was an act passed to authorize the merger and consolidation of these two companies. It was optional with the Atlantic & Pacific whether it would consolidate with the South Pacific company or not. Nearly a year before the passage of that act, the Atlantic & Pacific company had, as we have seen, purchased the franchises and property of the South Pacific company, and the title and terms of the act of 1871, show that the consolidation provided for was optional with the companies, and therefore the rights acquired by the Atlantic & Pacific company under the deed, did not depend upon a consolidation with the South Pacific company.

By that purchase it was invested with the rights, franchises and property of the South Pacific and thus having a connection with the Pacific road at Franklin, it was empowered by the act of 1870, to take a lease of that road, with all its privileges, rights and franchises, and among these, was the right to maintain and use the track of the Pacific company along Poplar street, if the latter company had the right to lay, maintain and use that track. It is conceded that the lease from the Pacific company to the Atlantic & Pacific company was duly executed, and that if the Atlantic & Pacific company had capacity under the law to take a lease of the Pacific road, that lease was effectual to pass all the property and franchises of the Pacific company which it could convey.

Had the Pacific Railroad Company the right to lay its track along Poplar street, St. Louis, in 1870? Respondents contend that the Poplar street track was but an extension of the main line, and that, having located its eastern terminus at Seventh street, and kept it there for years prior to 1870, the company had exhausted its power and could not afterwards extend its road under its charter, citing *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 364; 1 Am. Railway cases 150; *Morris & Essex R. R. Co. v. Central R. R. Co.*, 31 N. J. 207, and 1 Redfield, Sec. 1105, page 410.

4. RIGHT OF INDIVIDUALS AND THE STATE TO DISPUTE THE EXERCISE OF CORPORATE FRANCHISES.

The cases cited were controversies between railroad companies and individuals, and railroad companies. The State was not a party to the proceeding in either. In the first case the Jamaica company was authorized to construct a railroad commencing at an eligible point in the village of Brooklyn, and extending to any point in the village of Jamaica. The company located its western terminus at the foot of Atlantic street, and its eastern in the village of Jamaica, where it had ever since remained. The court says: "Having made its location and adhered to it for many years, it is concluded by what it has done. It had no franchise in Furman street which it could assign to the Central company."

The City Railroad Company was established, and commenced operating portions of its route long before the Central Railroad Company had an existence, and had laid down a railroad track in Furman street at its own expense. The Central company claimed that the Brooklyn & Jamaica company had the right by grant from the Legislature, to construct and operate a railroad through the streets of Brooklyn, which it had assigned to the Central company. It was not an attempt of the Brooklyn & Jamaica company to extend its line, or change its location; but to confer upon the Central company a right to build and construct a road along Furman street, on the ground that the charter of the Brooklyn & Jamaica company gave this company the right to lay its track in the streets of Brooklyn.

The court held that the Brooklyn & Jamaica company had no franchise in Furman street which it could assign to another company; that is a very different question from that presented for our determination, and while some of the observations of the court may be pertinent to the question before us, they were not necessary to the determination of the question in that case, but conceding as law all that is said in that opinion, it does not materially affect the question here. There is no evidence in this record that the eastern terminus of the Pacific railroad has ever

been formally selected. It is true, that it was built to Seventh street in St. Louis, and remained there for years; but it is also true, that it had previously remained for a length of time at Fourteenth street.

Supposing this track to be, as contended by respondent but an extension of the Pacific road, and that the time for the completion of that road, seventeen years from the date of the charter, had expired before this Poplar street track was laid, is it for the city of St. Louis, or any individual, to object to such extension, on that ground, if the State choose to permit the extension? There was no private property to condemn for a right of way, that had been granted along the streets by the General Assembly. It may be conceded that after the expiration of the time limited by the charter for the completion of a railroad, the property of individuals cannot be condemned for a right of way. This doctrine is amply sustained by the authorities cited by respondents. In *Peavy v. Calais R. R. Co.*, 30 Me. 499, the court said: "By the act of February, 1838, two years further were allowed to the company to complete their road. After the expiration of that period, they could not take the lands of individuals without their consent, for the extension of their road. They must act within the time given them by the Legislature."

But suppose that consent to have been obtained before the expiration of the time, is that case an authority for saying that still the company could not have proceeded to extend its road through the land? It does not go to that extreme, but only decides, that unless the consent be obtained within the time limited for the completion of the road, a right of way could not be condemned afterwards. Individuals may resist the condemnation of their lands for a right of way, after the expiration of the time given by the charter for the completion of the road, but cannot interfere to prevent the company from extending its road after the expiration of that time, over a right of way already acquired. The general principle, we think, is fully

sustained by *Chambers v. St. Louis*, 29 Mo. 576; *Land v. Coffman*, 50 Mo. 252; *City of St. Louis v. Shields*, 62 Mo. 247.

In *Chambers v. St. Louis*, Scott, J., said: "Whether these lands are necessary for the corporation, is a question that can only arise in a proceeding instituted by the State against the city for abusing her right to purchase land. The city had a power to purchase; if that power has been exceeded, then it has been violated, and the city charter may be forfeited in a suitable proceeding; and until that is done she will hold the lands. Shall she be compelled to contest, with every occupant who may get possession of them, her right to take and hold the lands? There being a right in the city to purchase, if there is a capacity in the vendor to convey so soon as a conveyance is made there is a complete sale; and if the corporation, in purchasing, violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the State and the city."

And in *Land v. Coffman*, Judge Adams, speaking for the court, in relation to the capacity of a railroad company to receive and dispose of lands, says: "But the amount of lands it may receive cannot be decided between these parties; conceding the power to receive lands for the purpose aforesaid, no one except the State can raise the question as to the amount that may be received."

The case of the *Brooklyn Central Railroad Co. v. Brooklyn City Railroad Co.*, 32 Barb., relied upon by respondents, fully sustains this view. There the court said: "If the Central company claim that the common council have the right to annul or impair the grant to the city company for breach of the condition to complete the work in a given time, it encounters this impediment. The condition to complete within a given time, is one of those distinguished in law as conditions subsequent. The effect of a deed with a condition subsequent, is to vest the estate in the grantee, subject to be defeated by his omission to perform the con-



dition. The omission does not *ipso facto* determine the estate, but exposes it to be determined at the election of the grantor. These conditions and forfeitures are not favored in law, because they tend to destroy estates. When the grantor institutes proceedings to recover the estate for conditions broken, the grantee may show that its performance has become impossible by reason of the acts of the grantor, or has been waived or dispensed with." Here the State is the grantor, and she alone can proceed against the company to arrest its proceedings to extend the road for a breach of the condition.

In the case of the *Mississippi & Tennessee Railroad Co. v. Devaney*, 42 Miss. 555, Shackelford, J., delivering the opinion of the court, said: "Again, if the right of way had been purchased from the defendant in error (Devaney) over his land, as proposed by the plaintiff in error (said Co.), and the connection made as it has been done, without opposition from Devaney, who could object to the running of their cars over their joint bridge and upon the track of Mississippi Central road?"

In that case the road had been completed to Granada, crossing the Yallabusha river over its own bridge. The Mississippi Central road also ran to Granada, crossing the same stream over a bridge of its own. In 1863 these bridges were burned by military forces, and the pecuniary embarrassments of the companies compelled them to unite in rebuilding the bridge of the Mississippi Central, and this necessitated the connection of the Mississippi & Tennessee with the other road, at a point north of Granada, and of course the abandonment of its road from Granada to the point at which it deflected to make that connection. The court held, in an able opinion, that railroad companies have power to re-locate the lines of their roads, after their completion under the first location, and to condemn, for the purpose of such re-location, private property, if there be a manifest necessity for the change, and no detriment thereby accrues to the public. We do not refer to that

portion of the opinion as approving it, but to show the diversity of opinion on this subject, and that courts of the highest respectability have claimed for railroad companies the right to condemn the lands of individuals to make a change of location of their roads, even after they have been completed and operated. The case, however, fully sustains the doctrine that no individual can interfere to prevent a company from laying its track over a right of way already acquired.

In *Ross v. The C. B. & Q. R. R. Co.*, 77 Ill. 127, the statute of the Legislature of Illinois required the road to be completed within eight years after its passage. Before the expiration of that time Ross, the defendant, had by his deed agreed to convey to the company a right of way through any land or town lots owned by him in Fulton county, Illinois. The company built its road through his premises, after the expiration of the eight years given by the act for the completion of the road, and he sued in ejectment, and the company filed its bill to enjoin that proceeding and compel Ross to convey the right of way. There was a decree in conformity to the prayer of the company's bill, and Ross appealed to the Supreme Court. Scholfield, J., delivering the opinion of the court, said: "The time specified for the completion of the road, in the 5th section of the act of February, 1854, was not irrevocable. It was competent for the Legislature and the company to change it at any time by mutual consent. The State alone could take advantage of a failure in this respect on behalf of the company, and if it should choose to waive its rights on that account, no one else could complain. While it may be said that the time within which the road was to be completed, may be presumed to have been within the contemplation of the parties when this instrument was executed, it may, on the other hand be said, it may also be presumed to have been within their contemplation that this provision might be subsequently changed."

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The case of the *Attorney-General v. West Wis. R. R. Co.*, 36 Wis. 466, cited by the Court of Appeals, was a proceeding by the State, and does not conflict with the views we have expressed. It would, it strikes us, be a monstrous doctrine that a railroad company, having completed nine-tenths of its road, and acquired the right of way for its entire length, within the time prescribed by the charter for its completion, could by an individual be arrested in the completion of the remaining one-tenth, after the expiration of the time; and in this contest it is to be borne in mind, that the city of St. Louis is but an individual, having only the rights of an individual, and in no sense representing the State.

Now, whether we regard this track on Poplar street to the Levee and thence to the elevator, an extension, a branch road, a spur, or a side-track, can make no difference, because, by its charter, the company had authority to build branch and lateral roads and side-tracks, and whether these could only be built as the main road, within the time for completing the latter, yet no one could prevent the company from building them over rights of way already acquired, except the State of Missouri.

But we are not prepared to say that a company which is limited as to the time given for the completion of its main line, and has power to build branch roads must do so within that time, or forfeits the right to build them. There was no limit to the authority to build branch roads by the charter of the Pacific company, except that they were not to exceed in length fifty miles from its main line. The railroad companies were chartered and assisted by the State to complete their roads, for the purpose of developing the resources of the State. Some of these roads ran through sparsely settled counties, to which, it was believed, that the construction of railroads would attract population.

But few of them at first, were in a condition to build branch roads, and the State was called upon, by all of

S. BRANCH RAIL-  
ROADS: charter  
limitations as to  
time of building.

them, and liberally responded to loan its money and credit to aid them to complete their main lines. The necessity for branch roads probably did not then exist, and would not arise until after the completion of the main lines. But whether they could construct these branch roads, and for that purpose condemn the lands of individuals after the expiration of the time for the completion of the main road, we will not now determine, but we think that the authority of this company to build a branch road, over a right of way already acquired, is fully settled by the cases above cited.

The Court of Appeals and the respondents' attorney seem to think that it could not be a branch road, because it ran in the same general direction as the  
6. BRANCH RAIL-ROADS. main track. If the company, by building to Seventh street, and there stopping for years, is precluded forever from extending its main line east, under its charter, as held by the Court of Appeals, then that is as much its eastern terminus as if it had been so fixed by the charter. Now, is there anything in the charter which forbids it from building a branch road east to the Mississippi river? Can it be that the company may run a branch road to any point of the compass except east, or in the general direction of the main line? We think such a position untenable.

But suppose that we are wrong, and that under the original charter the Pacific Railroad Company, after completing its road to Seventh street, had no right to extend it to the Mississippi, or to construct a branch road to the Mississippi river, or any distance east of Seventh street; yet, by an act of the General Assembly of February 15th, 1864, "to provide for the convenient delivery of railroad freight in the city of St. Louis," the North Missouri, the Iron Mountain and the Pacific railroad companies were authorized to connect their lines of roads with the main lines of each other within the county of St. Louis, and to lay switches to unload freight into the St. Louis grain ele-

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vator, &c. It is conceded by the respondents, and this seems to have been the opinion of the Court of Appeals, that the Pacific company had authority by that act to lay its track along the street, but it is contended that the company waived the right by accepting the provisions of the ordinance of the city of St. Louis, authorizing the company to lay its track along Poplar street, that it forfeited the right conferred by the statute by non-acceptance, and, that the act was repealed by the constitution of 1865.

In July or August, 1870, with the assent of the city given by ordinance on certain conditions, the Pacific company laid a track from its main track near Ninth street, along Poplar to Front street, or the Levee on the bank of the Mississippi river, thence along the Levee to the St. Louis grain elevator, there connecting with the North Missouri railroad. The city, as a condition to its assent, required that the track along Poplar street should be torn up in January, 1872. Afterwards, on the 26th of January, 1872, at the request of the company, the city passed an ordinance extending the privilege to the 1st of January, 1873, on certain conditions in the ordinance specified. After the passage of this last ordinance in February, 1872, the Pacific company declined to accept its provisions, notified the city of the fact, and tore up the track at a point between Eighth and Ninth streets, at the Fifth street crossing, and near the elevator, making breaks of several feet at those points; and the track remained in that condition for several weeks, when it was relaid by the company.

The assent of the city was not necessary to perfect the right which the company acquired by the act of the General Assembly to lay this track along the street. The State has absolute control of the streets in cities and other public highways; and a city has no authority, unless it be conferred by the Legislature, to authorize the use of any street within its limits for the construction and operation of a railroad to be traversed by a locomotive worked by

7. ESTOPPEL  
AGAINST EXERCISE  
OF CORPORATE  
POWERS: municipal  
power over  
streets: license.



steam. Dillon on Mun. Corp., §§ 575, 578, 579. And said the Court of Appeals in this case: "Streets, in incorporated cities and other public highways, are subject to the paramount authority of the Legislature in the regulation of their use."

Did the acceptance of the privilege from the city to lay the track estop the company from claiming the right to lay it under the act of the General Assembly? The ordinance was a nullity. The city undertook to grant a franchise which it had no authority whatever to dispose of. Upon its face, the ordinance was null and void. The company received nothing from the city as a consideration for relinquishing, or waiving the privilege granted by the General Assembly. The theory upon which railroad companies have been incorporated with power to condemn private property for rights of way is that they are public, not private enterprises—that the public has an interest in their construction and operation, and that the public welfare demands them.

Some courts have even gone so far as to hold that they can be compelled by mandamus to build them. The right of the city in its streets, and the control which the Legislature has over them, are matters of which the courts will take judicial notice. The city ordinance conferred no right, and could impose no obligation upon the company inconsistent with, or impairing the franchise granted by the State. The Legislature deemed it a matter of public concern, that the Pacific road should connect with the North Missouri and the Iron Mountain roads, at the St. Louis elevator, and passed an act for that purpose, and it is doubtful, if the right to make that connection by laying the track in question, could have been waived by the company, even for a valuable consideration received from the city, other than another route which would have answered the public demand. It is questionable whether the courts would not hold such a contract void as against public policy—and it seems to us idle to talk of a waiver of that

right by asking the consent of the city, and obtaining it—to do, what the company already had the right to do, without such consent. Why it was asked, cannot be conjectured, unless it was done in a spirit of conciliation by the company, to have the good will, rather than the enmity of the city authorities, and out of complaisance to them, to get their consent for doing what the company could just as well have done without such consent. There was no such relation as that of licensor and licensee created by the ordinance of the city, between the city and the Pacific company, for as we have seen, the city was utterly incapable of conferring upon the company the right to lay its track along a street of the city.

But if such a relation were created, the company surrendered the possession of the street to the city in February, 1872, tore up a portion of the track, abandoned the use of it, and this state of things continued for three weeks, and, then, the company under the right granted by the State, repaired its track and resumed its use. It did surrender to the city the possession of the street, and within the three weeks which elapsed after the company notified the city, that it rejected the conditions of the ordinance, the city authorities had complete possession of the street in question, and could have cleared it of the obstruction created by the company's track. In no view that can be taken of the case, has the doctrine of estoppel any application.

But it is contended that the company forfeited the franchise granted by the act, by non-acceptance. There was no time prescribed by the act within which the connection at the elevator should be made, and the laying of their tracks by the several companies named in the act, was an acceptance of its provisions. When the Pacific company first laid its track, it had no valid authority to do so, except from the State, and the laying of the track then, must be referred to the right conferred by the act. At all events, it accepted it, after

9. RAILROADS: acceptance of statutory privileges.

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it had abandoned the track and surrendered the street to the city, by repairing the track, where it had been torn up, and asserting its right to use and maintain it under the act of the General Assembly.

But respondent insists that the 27th section of article 4, of the constitution of 1865, repealed the act in question. That section reads as follows: "The General Assembly shall not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town." There is no conflict between this section and the act of the Legislature. This section of the constitution is prospective in its operation. Numerous decisions, and notably that in the case of the *State ex rel. v. Macon County*, 41 Mo. 457, have settled that question. The act of the General Assembly upon which the company relies, was passed before the adoption of the constitution, and the 17th section of the constitution was restrictive of the power of subsequent legislatures, and had no retrospective effect to repeal past legislation.

The fact, if established, that the track destroyed the use of the street for any other purpose, cannot be considered as depriving the company of the right granted by the General Assembly. It would have been a good reason perhaps, for a refusal to permit railroad companies to lay their tracks along the narrow streets of the old town of St. Louis; but the Legislature has seen proper to give to the Pacific company that right, and neither the city nor the courts can rightfully deprive it of the franchise. That the track was badly constructed and kept, and that trains passed over it at all hours, and at a dangerous rate of speed, were matters which might have been regulated by reasonable ordinances of the city, but did not authorize the city to tear up the track, or to prevent the company from relaying it.

Respondents contend that the Pacific Railroad Company had no vendible interest in Poplar street, or its track on

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Poplar street, and cite as authority to sustain them, *The People v. Duncan*, 41 Cal. 510, and *McPheeters v. Merimac Bridge Co.*, 29 Mo. 465. In these cases it was held that a franchise could not be sold except by the authority of the granting power. Here the grantor was the State, and the State authorized the sale.

We have not examined the question whether this cause was properly certified from this court to the Court of Appeals. Whether it was or not, it is now here, and the other questions presented by the record must be determined, and therefore that is not now a material question.

We have given this case the attention which its importance demands, and a careful examination of the authorities has satisfied us that the judgment of the Court of Appeals should be, and with the concurrence of the entire bench, it is accordingly reversed.

REVERSED.

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MARTIN, *Plaintiff in Error*, v. PAXSON, *et al.*

1. **Substitution of Trustees.** It is not necessary to the validity of proceedings under Rev. Stat. 1855, p. 1554, § 1, for the appointment of the sheriff to act as trustee in executing a deed of trust given to secure the payment of a debt in place of the person therein named as trustee, that the latter shall have signed the deed or otherwise signified his acceptance of the trust; nor is notice of the proceeding required to be given to the trustor.
2. **Sale under Trust Deed, NOT AFFECTED BY VOLUNTARY ABSENCE OF TRUSTOR IN CONFEDERATE STATES.** A sale under a deed of trust given by a debtor to secure the payment of his debt, is not invalidated by the fact that at the time it was made he was residing within the military lines of the Confederate States, if he was a citizen of Missouri at the time the deed was executed, and his removal within the Confederate lines took place after the debt matured and was voluntary.
3. **Deed of Trust: NOTICE OF FORECLOSURE.** A stipulation in a deed of trust given to secure the payment of a debt, that in the event of default in payment the trustee may sell the trust property lying in Morgan county, at public sale, at the court house door in Boonville, Cooper county, first giving at least thirty days notice of the time, terms and

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place of sale, and of the property to be sold, by advertisement in Morgan or adjoining county, is not void for uncertainty or as being against public policy. Such matters are proper subjects of contract between the parties, and their contract is binding.

*Error to Morgan Circuit Court.*—HON. GEORGE W. MILLER,  
Judge.

A. W. Anthony for plaintiff in error.

1. Brand was not a trustee, having never accepted the trust either by signing the deed, or by assent, oral or written, nor by any act indicating such acceptance, nor does it appear that he had any notice whatever of his appointment. Hill on Trustees, edition of 1854, top pages 303, 304, 306; 2 Am. Law Reg. (N. S.), pp. 651, 652, 653, 706, 713. A fair construction of the statute sustains the same view. Rev. Code 1855, p. 1554. The first section was not changed until the revision of 1865; and the second not until 1872. By the law of 1855, it is provided that "If any trustee, in a deed of trust to secure the payment of a debt," &c. This statute evidently contemplates that there must be in fact and in law a trustee, else there would be no authority to substitute the sheriff, or any one else, to act for a person or officer who never had an existence. To hold that Brand was a trustee in this case would lead to the strange doctrine that a person may be a trustee without acceptance, without assent, or any notice whatever of his appointment; and that another might be appointed to act for him, when he never had any notice, or any chance to act for himself. There is a mutuality in all trusts, fatal to such construction. The action of the circuit court, therefore, in the attempted substitution was wholly void.

2. If the trustee be clothed with the legal estate, I do not see how the title could vest in him without delivery or acceptance; and no person could be substituted in his stead. If the donation of the power was valid without acceptance, then it extended to Brand's executors or administrators, who are named in the deed as his successors



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in the trust; and the circuit court could only appoint when the trust was about to fail for want of a trustee; and upon a proper presentation of the facts.

3. The trust deed provides that notice shall be given in a newspaper in Morgan, "or any adjoining county," but the sale must be made at Boonville. This is void for uncertainty, as the notice had a scope of some five or six counties. Such a contract is against public policy also, and is void.

4. When the notice was filed to substitute the sheriff as trustee, a notice should have been served on Brand. The trustee is a trustee for the debtor. *Carter v. Abshire*, 48 Mo. 300; *Chesley v. Chesley*, 49 Mo. 540; *George v. Middough*, 62 Mo. 549. No notice was given, and the proceedings were, therefore, absolutely void. None could be given, as Martin was at the time in the State of Texas, within the Confederate lines. See dissenting opinion in *De Jarnette v. De Giverville*, 56 Mo. 440; 14 Am. Law Reg. (N. S.) 129.

*Draffen & Williams* for defendants in error.

1. The deed of trust passed the legal title to the land to Brand, with power of sale upon default. There was no evidence that he refused to accept the trust, and it was upon the public record of the county. It might be that if Brand was sued for neglect, he could raise this objection, but most certainly plaintiff cannot. *Bailey v. Lincoln Academy*, 12 Mo. 174.

2. Nothing is said in the statute indicating that the power of appointment is only to be exercised when the trustee has signed the deed, and then refused to act. The language is, "If any trustee in a deed of trust to secure the payment of a debt, shall die \* \* or remove from the State without having completed the performance of the duties imposed on him by the deed of trust," the court may, on application of any person interested, appoint the sheriff to act as trustee in his place.

3. The parties had a right to regulate, by their contract, the kind of notice of sale the trustee should give.

HOUGH, J.—This was an action of ejectment for certain land in Morgan county. On the 12th day of September 1860, the plaintiff executed a deed of trust conveying the land in controversy to H. H. Brand, as trustee, to secure the payment of a promissory note, of even date therewith, executed by him to E. N. Warfield, and made payable twelve months thereafter. In the event of default in the payment of said note, the trustee, his executor, or administrator, was authorized, by the provisions of said deed, to sell the property described, at public sale, “at the court house door in the city of Boonville, and county of Cooper, for cash, first giving at least thirty days public notice of the time, terms and place of said sale, and of the property to be sold, by advertisement in some newspaper printed and published in said county of Morgan, or adjoining county.”

In 1863, Martin, the plaintiff, left his residence in the State of Missouri and went to the State of Texas, where he remained until the year 1867; and from the time he went to Texas, until the close of the war, he was continuously within the Confederate lines. At the April term, 1864, of the Morgan circuit court, J. P. Beck, as beneficiary under the trust deed aforesaid, made application under the first section of the statute in relation to trustees, (Rev. Stat. 1855, p. 1554,) to have the sheriff of the county appointed trustee in the place of Brand, who, as was stated in the affidavit, had removed from the State, without executing the trust; and the order was made as prayed. This order is meagre and inexplicit, and certainly not a model for imitation; but it refers to the application, which is full and precise, and in the absence of record testimony showing that it is equally referable to some other application, we incline to hold it sufficient. It would be a harsh ruling, we think, to pronounce it void for uncertainty.

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On the 25th day of August, 1864, the property was sold under the trust deed to one Jemima Wilson, under whom, by a regular chain of conveyances, the defendant claims title.

The following objections were made to the defendant's title:

1. That as Brand did not sign the deed of trust, and there was no evidence that he had ever accepted the trust, there was, in fact, no trustee, and the action of the circuit court in substituting the sheriff as trustee, was wholly void.

2. No notice was, or could be, given to Martin, of the application to substitute the sheriff as trustee, or of the sale under the trust deed.

3. The deed of the sheriff as trustee was not *prima facie* evidence of the recitals it contained, and there was no evidence of the truth of the recitals.

Objections was also made that the plaintiff left a tenant in possession, and that he had no right to attorn to the defendant; but this point requires no notice. Wag. Stat., 880, Sec. 15. Besides it is unimportant in the present action, how the defendant obtained possession.

It was further objected that the stipulation in the trust deed, as to the notice to be given, was void as against public policy, and void also for uncertainty.

We do not think it necessary to the validity of the proceeding for the appointment of the sheriff as trustee, in lieu of the original trustee, Brand, that Brand should have signed the trust deed, or otherwise signified his acceptance of the trust with which he had been invested. Under deeds of this character, there is nothing for the trustee to do until called upon to make a sale in case of default in the payment of the debt, and until such request is made of him, there is really no occasion for him to assume or decline the duties imposed. His assent certainly is not essential to the validity of the deed, and if before being called upon to act, he should remove from the State,

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the contingency provided for in the statute would, we think arise, and the sheriff might lawfully be appointed his successor in the trust. No notice of such application is necessary; none is required by the statute. The proceeding is *ex parte*, and upon affidavit only; and by the provisions of the statute in force at the time the substitution in the present case was made, no question could arise as to the propriety of the appointment to be made by the court, as, under that statute, no other person than the sheriff of the county could be appointed.

To impeach the sufficiency of the notice of sale, the dissenting opinion in the case of *DeJarnett v. DeGiverville et al.*, 56 Mo. 440, is relied upon. Without entering into any examination of the conflicting opinions entertained here or elsewhere in relation to the subject presented by the objection now under consideration, it will be sufficient to say that the question presented in that case was widely different from that arising upon the facts in the case at bar. There, the question was whether a mortgage or deed of trust, executed by a citizen of Virginia to a citizen of Missouri, which required the payment of a sum of money on the 30th day of April, 1861, was forfeited by a failure to pay the money on that day, and whether the trustee or mortgagee might sell the mortgaged premises for such failure of payment, occurring after the beginning of the war between the countries in which the parties were respectively domiciled.

In the present case both parties were citizens of the State of Missouri, and remained so for a considerable period after the maturity of the note. No public law forbade the payment of the money, and the plaintiff, long after it became due, voluntarily placed himself within the Confederate lines, and beyond the reach of notice. There being no legal impediment to the payment of the debt, the default gave the trustee power to sell, after giving a certain notice. That notice was to be given in a manner agreed upon by the parties; it was absolute and unconditional in its terms,

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and its sufficiency was not to be determined by the place of residence of the trustor, or his ability to receive or be made cognizant of such notice at the time it should be given. Upon default, and the giving of the notice provided for, the trustee was authorized to sell.

The third objection seems to be based upon a misapprehension of the record. It very clearly appears, we think, that the sheriff testified that the notice was given by him, as set out in his deed to the purchaser, and that was in exact conformity with the requirements of the trust deed.

The remaining objection that the stipulation as to notice contained in the trust deed was void, is, we think, untenable. The parties might have dispensed with notice altogether. The trustor could have provided for a private sale. The notice to be given was a proper subject of contract between the parties, and their agreement must be held to be binding upon them.

Perceiving no error in the record, the judgment of the circuit court will be affirmed. The other judges concur.

AFFIRMED.

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*Ex parte RENO.*

1. **Pardon or Commutation:** WHEN EXECUTED, NOT REVOCABLE. A pardon or commutation of sentence takes effect, and the recipient of Executive clemency cannot be deprived of its benefits and immunities by a subsequent revocation, when it has been signed by the Executive, properly attested, authenticated by the seal of the State, and delivered either to the recipient, or to some one acting for him, or on his behalf.
2. **Constructive Delivery of a Pardon.** Delivery of a pardon by the Governor to one suing for the release of a prisoner confined in the State penitentiary, is constructive delivery to the prisoner.
3. **Pardon not Void because not Registered.** A pardon or commutation of sentence is not void because there is no entry made of



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it in the office of the Secretary of State, although he is required by law to keep a register of the official acts of the Governor.

4. **Conditional Pardon.** Under the Constitution of 1865, the Governor had power to grant a conditional pardon, but the conditions, to be operative, should appear on the face of the paper.

*Petition for Habeas Corpus.*

*Ewing & Pope* for petitioner.

1. A delivery to the prisoner, or to the Warden, or to any one for the prisoner, is sufficient. *Commonwealth v. Hallaway*, 44 Penn. Stat. 218; *In the matter of De Puy*, 3 Benedict's U. S. Dist. Ct. 307.

2. Being in possession of the grantee, it is presumed to have been duly delivered at the time it bears date. *Billings v. Stark*, 15 Fla. 297.

3. Being placed in the hands of a third party by the Governor for the prisoner, there is a delivery, although lost, destroyed or embezzled, while in such hands. *Henrichsen v. Hodgen*, 67 Ill. 179.

4. Anything done by the grantor in a deed, from which it is apparent a delivery was intended, either by words or acts, or both combined, is sufficient. The record of a deed raises a legal presumption that it has been delivered. *Kille v. Ege*, 79 Penn. St. 15.

*J. L. Smith*, Attorney-General, for respondent.

1. Section 21, article 5, of the constitution of 1865, provides that the Secretary of State shall keep a register of the official acts of the Governor, &c.; and the same provisions are embodied in the General Statutes of 1865, p. 139, Sec. 2. In the absence of such register, and it is not pretended that any was kept, the pretended commutation was not an official act of the Governor.

2. Gov. Brown expressly stated, on signing the commutation, that it must be so registered, or that he should consider it to be invalid. This was a condition precedent,

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and, unless observed, rendered the commutation invalid. *Commonwealth v. Halloway*, 44 Penn. St. 210; 2 Hale, P. C., pp. 542-3-8-9; *U. S. v. Wilson*, 7 Peters 150; *State v. Leak*, 5 Ind. 359; *U. S. v. Stetter*, 1 Whart. Crim. Law, (15th Ed.) 766, note.

3. No delivery of the commutation had been made January 11th, 1873, and Gov. Woodson's general order revoking all orders issued by Gov. Brown, not then delivered, had the effect of annulling the commutation. *State v. McIntire*, 1 Jones (N. C.) 1; *Bird v. Breedlove*, 24 Ga. 622; *Ex parte De Puy*, 3 Ben. D. C. 307.

NORTON, J.—This is a proceeding by *habeas corpus*, on the part of John Reno, who alleges in his petition that, on the 16th day of January, 1868, he was convicted by the circuit court of Daviess county of burglary and larceny, and his punishment assessed at twenty-five years imprisonment in the penitentiary; that he is now confined in said penitentiary by the warden thereof, under said judgment and commitment; that on the 8th day of January, 1873, his sentence and punishment was commuted to ten years imprisonment by B. Gratz Brown, the then Governor; that he has served out his commuted sentence of ten years, and is entitled to his discharge, but that, notwithstanding this fact, he is still detained by James R. Willis, the warden, in confinement in said prison, who refuses to discharge him.

To the writ issued on the petition, the said Willis makes return and admits that he holds said Reno in custody by virtue of the judgment and sentence of the circuit court of Daviess county, sentencing him to twenty-five years imprisonment from the 16th day of January, 1868, but denies that said sentence has been commuted as alleged, and denies that petitioner is entitled to his discharge.

Petitioner filed his plea of commutation, which sets out the original pardon, signed by Governor Brown, as the ground upon which he claims his discharge. This we

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shall treat as an answer to the return, and shall consider the replication filed thereto as making up the issues in the case.

In the reply it is admitted that the then acting Governor, B. Gratz Brown, on the 8th of January, 1873, issued the paper attached to the plea, but it is denied that it had the effect to commute the punishment of petitioner from twenty-five years to ten years.

1st. Because it was never delivered;

2nd. Because it was never registered in the office of the Secretary of State;

3rd. Because the condition, requiring it to be registered in said office, was never complied with, and it was never entered on the prison records;

4th. Because said pardon or commutation revoked by Governor Woodson, the successor of Brown.

It may be observed, as preliminary to the consideration of these questions, that a pardon or commutation is a mere matter of grace, and until this act of clemency is fully performed, neither benefit nor rights can be claimed under it. Simple intention on the part of the executive to bestow a pardon, confers no right, and is perfectly nugatory until the intention may be said to be fully completed. This intention may be said to be fully completed when the pardon is signed by the Executive, properly attested, authenticated by the seal of the State, and delivered, either to the person who is the subject of the favor, or to some one acting for him, or on his behalf. Whenever these things are done, the grantee, or donee of the favor, becomes entitled as a matter of right to all the benefits and immunities it confers, and of which he cannot be deprived by revocation or recall. *Commonwealth v. Hallowsay*, 44 Penn. St. 218. If these are correct principles governing such cases, and we think they are, the application of them to the evidence in this case will render the solution of the questions presented for our determination free from difficulty.

1. PARDON OR COMMUTATION: when executed not revocable.

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It is not pretended that the commutation reducing the punishment of petitioner from twenty-five to ten years, was procured by fraudulent or corrupt practices. On the contrary, Governor Brown testifies that he was induced to issue it from the conclusion which he had reached after much consideration, that ten years imprisonment was a sufficient punishment in any case where the party was sentenced for an offense committed against property. That he intended to issue the pardon, and in point of fact did issue it is clear beyond controversy, and indeed, stands admitted in the pleadings.

Was it delivered by him to the prisoner or any one for him? We think the evidence shows that it was. Gover-

2. CONSTRUCTIVE  
DELIVERY OF A  
PARDON.

nor Brown testifies that on the morning of the last day of his term of office, when he went to his office, he found persons there to remind and urge anew the matter of Reno's pardon; that he went to the office of the Secretary of State, got a pardon in the usual form filled in, with the exception of the term and the name, took it to his office, and after some little further thought, inserted the name and the reduction of his term of imprisonment to ten years, and handed the paper to one of the parties present in the ante-room, stating that it must be inscribed at the prison, and filed in the office of the Secretary of State before 12 o'clock, or he should consider it invalid, as he would be out of office at that hour. Now, it is impossible for the mind to resist the conclusion that the person to whom the pardon was delivered, was acting for and on behalf of Reno. If so, the delivery was complete, and the right of Reno to the benefits it bestowed, became fully established. But the delivery is further shown by the evidence of Bradbury, who was a deputy warden of the prison on the 8th of January, 1873, and who swears that, in the evening of that day he saw the commutation in the hands of Dougherty, the warden, who directed his clerk Haly to make an entry of it on the prison records; that the clerk, thereupon, with the paper before

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him lying on the table, made the following entry opposite the name of Reno, "commuted from twenty-five years to ten;" that he was looking over the shoulders of the clerk and saw him make the entry; that about one month afterwards he examined the prison records and found that the entry had been erased, and that afterwards he found that part of the leaf on which it was made entirely torn off.

Thompson, who was the prison physician, testifies that on the morning of the 8th of January, 1873, about 11 o'clock, Dougherty, the warden, told him that Reno's sentence had been commuted to ten years, and handed him an official envelope from the Secretary of State's office, that he took it out of the envelope, that it had upon it the seal of the State and the signature of the Governor, that he did not read it, but accepted the statement of Dougherty as to what it was.

It thus appears that the pardon, after it passed from the hands of Governor Brown, was delivered to the Warden, Dougherty, who, as the evidence shows, was the customary recipient of such papers, in an official envelope from the office of the Secretary of State, on the morning of the day it issued, and that it was entered on the prison records in the afternoon of that day. The subsequent erasure of this entry and mutilation of the record, by tearing off so much of it as contained the entry, cannot affect the previously invested rights of Reno, but would justly consign the parties, who were engaged in it, to the incarceration and punishment, which they must have intended thereby to continue and perpetuate on Reno. The evidence also establishes the fact, that the custom was, where a pardon was granted, to deliver it to the warden, who made, on receiving it, the appropriate entry opposite the convict's name. The person to whom Governor Brown handed the pardon, was authorized to deliver it to the warden, for he testifies that he said it must be inscribed on the prison records, and expressed the opinion that it



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should be done by 12 o'clock, as, after that time, he would cease to be Governor. A delivery of the pardon, under the circumstances in proof is, *prima facie*, equivalent to delivery, or is constructive delivery to the prisoner. 44 Penn. St., *supra*.

It is, however, insisted that the pardon is void, because there was no entry made of it in the office of the Secretary of State, who is required to keep a register of the official acts of the Governor. It would be establishing a hard and unreasonable rule to declare that the mere omission of the Secretary of State to enter in his register that the Governor had granted a pardon, would render void a pardon, which was intended to be issued, and was in fact issued and delivered. The pardon in question, on its face shows that it was the official act of Governor Brown, that he had a right to act on the subject to which it related, and that, in the action taken by him, he did not go beyond the scope of his power. The omission of the Secretary to make an entry of the official act of the Governor, in granting a pardon, would not have the effect to make void the pardon, any more than an entry, made by him in his register that the Governor had granted a pardon, would impart validity to it, when, in fact, no such pardon had ever been granted. Besides, the prisoner had no authority or control over the Secretary of State in regard to the performance of his duties. The principal announced above, as to the effect of the Secretary's failure to enter the act of the Governor in his register, is analogous to that declared is the case of *Scruggs v. Scruggs*, 41 Mo. 248, where it was held that the omission of the clerk to make the proper entry on his record, as to the acknowledgment of a sheriff's deed, would not impair its validity, nor prevent the transmission of title under it. The power of the Governor to grant pardons and commutations is in nowise dependent upon any entry which the law requires the Secretary of State to make, nor upon any required to be made by the warden. The former require-

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Ex parte Reno

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ment may be regarded as intended to preserve the evidence of the official acts of the Governor, and the latter, as designed to protect the warden in discharging a prisoner, who is the recipient of Executive clemency. The power of the Executive in this case was derived from the 6th section, article 5, of the constitution of 1865, which provides that, "The Governor shall have the power to grant reprieves, commutations and pardons after conviction for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, commutation or pardon granted; stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the pardon, commutation or reprieve, and the reasons for granting the same."

It might, with the same show of reasoning, be contended that the failure of the Governor to report the fact of a pardon, the name of the convict, &c., to the General Assembly, would authorize the recapture and reimprisonment of the prisoner, who had been discharged by virtue of a pardon, and subject the warden to prosecution for allowing an escape, as to contend that the omission of the Secretary to record in his office the fact that a pardon had been granted, would render void an act of the Governor, which he had the full power to perform, independent of the question whether it was, or was not, recorded.

It is objected that the entry of the pardon, in the office of the Secretary of State, was one of the conditions on which it was granted, and, not being complied with, rendered it void. While the Governor may grant a pardon on conditions, such conditions to be operative should appear on the face of the paper. It is also insisted that the pardon in question,

4. CONDITIONAL  
PARDON.

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was revoked by Governor Woodson, who succeeded Brown, and that proof thereof is to be found in the following receipt of W. H. Dougherty, the warden, viz :

"Received from Eugene F. Weigel, Secretary of State, a letter marked 'important,' containing peremptory instructions from Silas Woodson, Governor of Missouri, concerning a pardon, or other documents issued from the Executive Department, or Secretary of State's office, of date, prior to January 11th, 1873, and not yet presented to me, at 12:45 A. M., this January 11th, 1873.

W. H. DOUGHERTY, Warden."

If the purpose of the document referred to in the receipt, was to revoke the commutation of Reno's sentence, it does not so appear, for no mention in terms is made of it. Its effect, according to the receipt, was to revoke only such pardons or documents as had not, up to the 11th of January, 1873, been presented to the warden. It cannot, therefore, have the effect which is claimed for it, because, the commutation of Reno had, three days prior thereto, on the 8th of January, been presented and acted on by said warden. The case of *Moses De Puy*, reported in 3 Benedict's D. C. R. 307, to which we have been cited, has no application. The principle there decided was that to make a pardon a completed act, there must be a delivery of it to the prisoner, or some one for him, and that, until this is done, the pardon is revocable. The correctness of these declarations are undisputed by us.

The case in 44 Penn. St., *supra*, and the case of *State v. Teak*, 5 Ind. 357, to which we have been cited, do not apply, the pardon in both cases having been declared void, because they were procured by fraud and forgery.

We have already shown, that in the case before us, there is no pretense of fraud in the procurement of the the commutation. The prisoner having served out the full term to which his sentence was commuted, his further imprisonment is illegal. He is entitled to a discharge from the imprisonment of which he complains, and he is, there-

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fore, by the judgment of this court discharged therefrom; all the judges concurring, except Judge HOUGH, not sitting.

DISCHARGED.

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WERNECKE *et al.*, Appellants v. KENYON'S Administrator.

1. **Subrogation: RIGHTS OF SURETIES ON AN ADMINISTRATOR'S BOND WHO HAVE PAID DEBTS OF THE ESTATE.** An administrator having failed to collect and pay over the purchase money of land sold by him to pay a debt which had been allowed against the estate of his decedent, was sued by the creditor on his bond, and his sureties were compelled to pay the debt. In a suit by the sureties to have the administrator's deed to the land set aside as fraudulent and themselves subrogated to the rights of the creditor, and for general relief, the deed was set aside, and *it was Held*, 1st, That they were entitled to have the benefit of the creditor's allowance, and that the proper mode of enforcing their right was to procure an order of the probate court for the sale of the real estate of the deceased to satisfy that allowance; 2nd, That they were not entitled to have the probate court allow as a claim against the estate of the deceased a judgment which they had obtained against the administrator for the amount of the debt paid by them, together with costs and expenses incurred in resisting payment.
2. **Probate Jurisdiction: STATUTE CONSTRUED.** In a county in which a probate court is established, having by statute exclusive original jurisdiction "to hear and determine all suits and other proceedings instituted against executors or administrators upon any demand against the estate of their testator, or intestate," the circuit court has no jurisdiction to enter a money judgment against the estate of a deceased person, or to charge the lands of the estate with the payment of such judgment.

*Appeal from Madison Circuit Court.*—HON. LOUIS F. DINNING, Judge.

The object of this proceeding was to procure the enforcement and satisfaction of a decree of the circuit court of Madison county, which is set out in full in the opinion in this case.

Plaintiffs presented this decree to the probate court

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and had it allowed for the full amount of \$789.59, against the estate of H. F. Kenyon, deceased. The allowance in favor of Madison county against said estate, referred to in the opinion, was for \$250. The plaintiffs, as sureties on the bond of the administrator of the estate, were compelled, after prolonged litigation, to pay that allowance, together with the costs of the litigation. The decree for \$789.59 embraced these costs and ten per cent. interest on the whole amount paid by plaintiffs. The other facts appear in the opinion of the court.

*B. B. Cahoon and J. B. Douchouquette* for appellants.

1. The judgment of the Madison circuit court cannot be attacked collaterally. Kenyon's administrator was duly served and brought within the jurisdiction of the court. If the court had jurisdiction of the subject-matter of the suit, the judgment rendered by it cannot be impeached collaterally, and it is valid, no matter what errors were committed in rendering it, until reversed or annulled by a direct proceeding instituted for the purpose. *Martin v. McLean*, 49 Mo. 361; *Taylor v. Hunt*, 34 Mo. 205; *Landes v. Perkins*, 12 Mo. 254; *Hendrickson v. St. L. & I. M. R. R. Co.*, 34 Mo. 188; *Warren v. Lusk*, 16 Mo. 111; *Cooper v. Reynolds*, 10 Wallace 315; *Stovall v. Banks*, 10 Wal. 583; *McGoon v. Scales*, 9 Wall. 23; *Florentine v. Barton*, 2 Wall. 210; *Harvey v. Tyler*, 2 Wall. 328.

2. The failure to answer the plaintiffs' petition admitted their right to recover. *Robinson v. Mo. R'y Con. Co.*, 53 Mo. 436; *Stewart v. Caldwell*, 54 Mo. 538. And having once appeared to the action, the judgment cannot be decreed void collaterally, as is sought here to be done. *Bracket v. Bracket*, 53 Mo. 265; *Marsh v. Bast*, 41 Mo. 493; *Collins v. Bannister*, 48 Mo. 435; *Finney v. State*, 9 Mo. 624.

3. But as to the power of the circuit court to subrogate the plaintiffs. The plaintiffs were Wood's securities as administrator of Kenyon. He was Kenyon's personal



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representative, and as such, he was bound to apply the property left by Kenyon to the payment of his debts. If Wood, as administrator, failed to do so, and the debts of Kenyon were paid by the plaintiffs, the property of Kenyon, so bound for the payment of his debts, remained after the cancellation of the fraudulent deed, as it did, a part of his estate, then by virtue of correct, equitable principles, the plaintiffs became, in a sense, securities for Kenyon.

4. Where the principal fails to pay a debt, and the security is compelled to do, the security is immediately subrogated to all the rights of the creditor, and although he does pay, not as an extinguishment of the debt, but the debt, such payment results, by the process of equitable assignment, in the nature of a purchase by the surety of the debt from the creditor, and the surety thereupon is entitled to have vested all the rights and benefits the original creditor had, or might have had. *Cole Co. v. Angney*, 12 Mo. 132; *Crump v. McMurtry*, 8 Mo. 408; *Furnold v. Bank of Missouri*, 44 Mo. 336; *Berthold v. Berthold*, 46 Mo. 561; *Seely v. Beck*, 42 Mo. 143; *Hayes v. Ward*, 4 Johns. Ch. 123; *Lidderdale v. Robinson*, 12 Wheat. 594; *Lathrop & Dale's Appeal*, 1 Barr 512; *Ex parte Crisp* 1 Atk. 133; *Wright v. Morley*, 11 Vesey 22; *Parsons v. Briddock*, 2 Vern. Ch. 608; *McCune v. Belt*, 38 Mo. 281; *Smith v. Schneider*, 23 Mo. 447; *Haven v. Foley*, 18 Mo. 138; *Cheesebrough v. Millard*, 1 Johns. Ch. 409; 1 Sto. Eq. Jur., §§ 327, 469, 477, 483, 493, 499 and 499a; 1 W. & T. Lead. Ca. 60, and note; *Ibid* 557, 559; 1 W. & T. Lead. Ca. 105, and Am. note; *Enders v. Brune*, 4 Rand. 438; *Douglass v. Fagg*, 8 Leigh. 588; *Cottrell's Appeal*, 11 Harris 294; *Mount v. Valle*, 19 Mo. 622; *Powell v. White*, 11 Leigh 309; *Sotheren v. Reed*, 4 Harr. & Johns. 307; *Merryman v. State*, 5 Harr. & Johns. 423; *Hollingsworth v. Floyd*, 2 Harr. & Gill 88; *Watkins v. Worthington*, 2 Bland 509, 529; *Wheatley's heirs v. Calhoun*, 12 Leigh 265; 9 Watts 451; *Himes v. Keller*, 3 Watts & Serg. 401-4; *Perkins v. Kershaw*, 1 Hill's Ch. 344, 351; *Norwood v. Norwood*, 2 Harr. & Johns. 238.

5. But it is contended that even though the plaintiffs could be subrogated, the court acted erroneously in rendering judgment for the amount it did against the estate, because the claims had previously been probated in favor of the county against the estate.

1st. To this we reply that such action does not render the judgment absolutely void, and the position is not available in this collateral attack upon the judgment.

2nd. That in so rendering the judgment against Kenyon's estate the action of the circuit court has already been approved, and declared legal, in *Wernecke et al. v. Wood, Adm.*, 58 Mo. 358.

3rd. And that the ascertaining of the amount due and paid by the plaintiffs, was not an improper action on the part of the circuit court, for the judgment had to be classed against the estate and in the name of the plaintiffs. The probate court had no power to order this equitable assignment of the old allowances in the name of the plaintiffs. Moreover, resort in the action was had to a court of equity, and having acquired jurisdiction of a part of the case, it did right to complete the entire judgment, so that when it was presented for classification, in the name of the plaintiffs, it would be complete in itself. (*McDaniels v. Lee*, 37 Mo. 206; *Rozier v. Griffith*, 31 Mo. 174; *Keeton v. Spradling*, 13 Mo. 321; *Holland v. Anderson*, 38 Mo. 58; *Hosford v. Merwin*, 5 Barb. 62; *Wiswall v. McGown*, 2 Barb. 270; *Corby v. Bean*, 44 Mo. 379.)

6. This is not one of those cases of which the Madison probate court, under the act creating it, has exclusive original jurisdiction. It is not a suit for or "upon any demand," as is contemplated by that act. It is a proceeding in equity.

1st. To cancel a fraudulent deed.

2nd. To obtain judgment against Kenyon's estate for the amount paid; and,

3rd. To be subrogated to the rights of Madison county on a demand before established and allowed in that

court. The probate court, under the special statute, had no power as a court of equity, nor could it cancel a fraudulent deed, or subrogate any person, and especially the plaintiffs.

*J. W. Emerson* for respondent.

1. If the judgment of the Madison circuit court had been a judgment against the estate of Kenyon—as it was not—it would have been a nullity, because,

1st. That court did not have jurisdiction at all to render any judgment for money against the estate of deceased persons; and

2nd. Because the claim of Madison county—to which plaintiffs had been subrogated—had long before been duly adjudicated, that is to say, the judgment offered, shows on its face that the probate court had years before rendered judgment for this claim against the estate; and it further shows that this same probate court still had jurisdiction over the case.

2. The circuit court, by decree, had subrogated plaintiffs to the rights of Madison county as creditor of this estate. In other words, the court, as a court of equity, by its decree, virtually assigned the claim of Madison county to the plaintiffs. They then stood just where Madison county stood when it held the claim against the estate duly allowed by the probate court. They had no more or different rights than Madison county did have. They took just what Madison county had. No more, no less. They got only the rights of Madison county. They could not enforce their claim any differently than Madison county could have enforced it. This is certainly very plain. How could Madison county enforce its judgment or allowance against the estate of Kenyon? Could it have brought a new suit in the circuit court, on the judgment of the probate court of the same county still duly administering this estate? The very suggestion shows its utter absurdity.

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ty. No. They had valid judgments in the probate court, a court capable of enforcing payment—the only court having jurisdiction at all. These claims or judgments of Madison county had been duly assigned to these plaintiffs by force of the decree of subrogation, and they should have enforced payment through the probate court and the administrator, and not attempt to get new judgment for three or four times the amount paid on the old judgments or allowances.

3. The defendant is not attempting to attack the judgment collaterally. Directing that the judgment against Wood and his wife be paid out of the real estate of the Kenyon estate, and rendering a judgment against the estate expressly, and for a specific sum, are two very different things. The circuit court could make no such order, as the law settled that. But it is enough that it did not in fact render any judgment against the estate for money; that judgment was only against Wood and his wife, and so was properly excluded by the court below.

4. The court below properly gave judgment for the defendant. Any other result would be an outrage on the heirs. Plaintiffs have the claim of Madison county against the estate duly assigned to them by the decree; that claim has been duly adjudicated and allowed by the probate court. They need no further judgment to make the claim effectual. They can enforce the original allowances of Madison county against the estate, and no more. The administrator should have paid these off without costs or litigation. When he failed to do so his securities—these plaintiffs—should have done so. Because they were stubborn and made hundreds of dollars of costs by years of litigation before doing so, does not make the estate liable for the costs these plaintiffs, the securities of Wood, made in fighting the claim. They were only compelled to do what they ought to have done without expense. Because the old administrator, Wood, was a defaulter to the estate, is no reason why his securities should be permitted to rob

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it. They were securities on purpose, and for the only purpose, of making good to the estate any defalcations of the administrator. All they can recover from the estate is the simple debt they paid for the estate, and this they already have allowed by the old allowances against the estate.

HENRY, J.—In 1861, H. F. Kenyon died intestate, and letters of administration on his estate were granted to his widow, Musidora Kenyon, and subsequently to her second husband, Ira L. Wood. Kenyon owned certain lots in Fredericktown, and other lots in Ironton. Plaintiffs were Wood's sureties on his bond as administrator. The deceased was indebted to Madison county on account of money borrowed by him of the school fund, and the demand was allowed against the estate by the probate court of said county.

The administrator, Wood, obtained an order from said court, to sell the real estate of Kenyon at Fredericktown to pay off said allowance, and at the sale, his wife became the purchaser, and he so reported to the probate court, but the purchase money was not paid, and Madison county collected her debt against Kenyon of the plaintiffs, sureties on Wood's bond. Plaintiffs then instituted a suit in the Madison circuit court against Wood and wife, and Wood as administrator of Kenyon's estate, alleging that the sale to Mrs. Wood was fraudulent, and asking that it be set aside, and that plaintiffs be substituted to the rights and claims of Madison county against said estate and for general relief.

The court made a decree "that the plaintiffs have and recover from said defendants, Ira L. and Musidora Wood, the sum of \$789.59, being the amount paid in manner and form as aforesaid, by the plaintiffs, and interest on the part thereof paid to the county of Madison, at the rate of ten per cent. per annum from the date of said judgment, which said sum of \$789.59 is to bear interest at the rate of ten per cent. per annum from the date of this judgment until



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paid, together with cost of this suit. It is further considered, ordered and adjudged, and decreed, that plaintiffs, by reason of the premises, be subrogated and substituted to all the rights which said county of Madison, for the use of all the inhabitants of said township aforesaid, had or might have had in said property hereinbefore described, belonging to said estate of said H. F. Kenyon, deceased, before the payment of said sum of money to said county, as aforesaid, by plaintiffs, in manner and form as found aforesaid, by the court; that said sale and the deed of said property, hereinbefore described in the finding of the court, be, and the same are hereby set aside, canceled and forever held for naught, and that the whole of said property hereinafter described, and all other property belonging to said estate of H. F. Kenyon, deceased, not now disposed of, be charged with the payment of said sum of \$789.59, with the interest thereon at the aforesaid rate of ten per cent. per annum, and that the said sum of \$789.59, debt and damages, and the interest aforesaid found to be due the plaintiffs, together with their costs, be levied on said real estate of H. F. Kenyon, deceased, and described as follows, (then follows description of the lots in Fredericktown and Ironton); and it is further ordered and adjudged by the court, that if said premises above described, and the other property belonging to said estate, not now disposed of, if any there be, is not sufficient to satisfy said debt, damages and costs, that the residue of said debt, damages and costs be levied of the goods, chattels, lands and tenements of said defendants."

Plaintiffs caused an execution to issue on said judgment from the clerk's office of the Madison circuit court, which, on motion, was quashed by that court, and on an appeal to this court, the judgment of the court on the motion to quash the execution, was affirmed. *Wernecke et al. v. Wood, Admr.*, 58 Mo. 354. Plaintiffs then presented said judgment in the probate court of Madison county for allowance, against the estate of Kenyon, and the court

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allowed it in the sixth class of demands against said estate, and from that judgment of the probate court the administrator appealed to the circuit court of Madison county, which reversed the judgment, and plaintiffs have prosecuted their appeal to this court.

The demand of Madison county against Kenyon's estate, having once been allowed in the probate court, was merged in that judgment. The decree of the court in *Wernecke et al. v. Wood, Admr.*, reported in 58 Mo., did not revive the original demand, or find the existence of an indebtedness of the estate to the plaintiffs, but only subrogated them to the rights of Madison county, as those rights existed before plaintiffs paid the debt which the estate owed to Madison county.

Those rights were to have the benefit of the allowance, and such orders of the probate court as might be necessary and proper to enforce its judgment in favor of Madison county and against Kenyon's estate. The payment of the debt by the plaintiffs to the county, did not constitute them creditors of the estate, but creditors of the administrator, and only in equity could they be subrogated to the rights of Madison county. They had no legal demand against the estate, and we do not understand the decree of the court in *Wernecke* against Wood as a judgment against the estate of Kenyon in favor of plaintiffs for the amount of their demand, but as subrogating plaintiffs to the rights of Madison county, and then charging all of the property of the estate with its payment, and decreeing its sale for that purpose. The circuit court could make the decree, setting aside the sale to Mrs. Wood and subrogating the plaintiffs to the rights of Madison county, but had no jurisdiction by its own process to enforce the balance of the decree, except that against Wood personally. This was distinctly held by this court in *Wernecke et al. v. Wood, Admr.*, *supra*.

NAPTON, J., delivering the opinion of the court, observed: "To cite authorities to prove that in this State

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a judgment against the administrator of a decedent could only be executed by a proceeding in the probate court, is unnecessary. It has so long been in our statutes that an examination of them is unnecessary."

Plaintiffs, after the decree was rendered in that cause, in order to avail themselves of their rights under the decree, had but to procure an order of the probate court to sell the real estate of the deceased to satisfy the judgment of that court in favor of Madison county. This was evidently the meaning of the language of the court, and it is not an intimation that the judgment in *Wernecke et al. v. Wood, Admr.*, should be allowed in the probate court.

But supposing that the judgment in that case was a judgment in favor of plaintiffs against Kenyon's estate, the subject-matter was one of which that court had no jurisdiction. The act establishing the probate court of Madison county, conferred exclusive original jurisdiction upon that court, "to hear and determine all suits and other proceedings instituted against executors or administrators, upon any demand against the estate of their testator or intestate," Acts 1849, p. 436, § 4; and in *Dodson, Admr. v. Scroggs, Admr.*, 47 Mo. 287, this court construing a section of the act establishing the probate court of Dade county, identical with the section above quoted, held that the circuit court had no authority to try causes against executors or administrators upon demands against the estate.

Bliss, J., said: "But how can the circuit court of Cedar or any other county have authority to try causes against executors or administrators of Dade, when the statute says that the probate court alone shall have the right to try them. The exclusive jurisdiction given to the probate court of Dade, by implication, prohibits all other courts from acting, the circuit court of Cedar as well as that of Dade." The court in *Wernecke et al. v. Wood*, had jurisdiction of the cause, as to the matter of subrogation, (for that was not a demand against the estate,) but had no

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jurisdiction to enter a judgment for plaintiffs against the estate for \$789.59, or any other sum. Plaintiffs, in fact, had no demand against the estate of Kenyon, and this is apparent upon the record, and although the judgment of the court is somewhat ambiguous, we do not construe it as a judgment against the estate for any sum of money.

The decree does not find that Kenyon's estate was indebted to plaintiffs. It was not alleged in the petition, and the facts that were alleged showed that plaintiffs had no demand against Kenyon's estate. So much of the decree as charges the property with plaintiffs' claim against Wood individually, and decrees a sale of the property of the estate, was a mode provided for the execution of the decree for subrogation, which the court, as we have seen, could not do, and it was a nullity.

In *Wernecke et al. v. Wood, Admr., supra*, the court said: "There could be no doubt of the power of the court to order the deed to be canceled, and to direct that the land conveyed be considered as a part of the estate of Kenyon, but then the claim would take the course prescribed by our statute in relation to claims against the estate of a decedent."

The judgment of the circuit court is affirmed. All concur, except SHERWOOD, C. J., absent.

AFFIRMED.

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FLETCHER, *Plaintiff in Error* v. KEYTE *et al.*

**Forcible Entry and Detainer.** A complaint in an action for forcible entry and detainer before a justice of the peace, not verified by affidavit, is insufficient and does not give the justice jurisdiction to try the case.

*Error to Macon Court of Common Pleas.*—HON. WILLIAM A. GUYSELMAN, Judge.

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*E. A. Fletcher and J. L. Berry* for plaintiff in error.

*B. G. Barrow and Gillstrap & Matthews* for defendants in error.

SHERWOOD, C. J.—Action for forcible entry and detain-  
er. Complaint insufficient because not verified by affidavit.  
(1 W. S., 643, § 6). The justice, therefore, never acquired  
jurisdiction; no more did the court of common pleas. As  
the judgment of that court, however, went for the defend-  
ants, we affirm the judgment. All concur.

AFFIRMED.

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DRITT, *Plaintiff in Error* v. SNODGRASS *et al.*

1. **Power of School Directors to make Rules:** LIABILITY FOR EN-  
FORCING THEM. The school law (Wag. Stat., p. 1264, § 8), provides  
that the board of directors "shall have power to make and enforce  
all needful rules and regulations for the government, management  
and control of such schools and property as they shall think proper  
\* \* not inconsistent with the laws of the land." A board of di-  
rectors having made a rule that no pupil should, during the school  
term, attend a social party, the plaintiff, a pupil of the school, by  
the permission of his parents, violated the rule, and was expelled  
from the school for so doing. In an action against the directors to  
recover damages for the expulsion, *Held, 1st*, that under the law,  
they had the power to make needful rules for the government of pu-  
pils while at school, but no power to follow them home and govern  
their conduct while under the parental eye; that in prescribing the  
foregoing rule they had gone beyond their power, and had invaded  
the rights of the parents; but, *2nd*, as there was no malice, oppres-  
sion or willfulness on the part of the directors, they were not liable  
in damages.
2. **Pleading Malice.** In a case where malice is the gravamen of the  
action, the petition will be held bad on demurrer, if the facts as de-  
tailed in it show that there was no malice, notwithstanding it con-  
tains a general charge that defendant's acts were willful, malicious  
and oppressive.



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*Error to Moniteau Circuit Court.*—HON. GEORGE W. MILLER, Judge.

*Rice & Walker* with *J. L. Smith* for plaintiff in error.

1. The privilege granted to the youth of this State by the statute, in obedience to the command of the constitution, (Art. 9, Sec. 1,) to receive instruction in our public schools, is a legal right, as much as any vested right in property. *Ward v. Flood*, 48 Cal. 36.

2. The law may be said to confer upon the school board general powers. They are ministerial officers clothed with discretionary powers partaking of a judicial character; but the law implies that all their acts, their rules and regulations for the government of the school under their charge, must be just and reasonable, and calculated to promote the general objects of the law. *Rulison v. Post*, 79 Ill. 567; *Hodgkins v. Rockport*, 105 Mass. 475; *Roberts v. Boston*, 5 Cush. 198; *Sherman v. Charlestown*, 8 Cush. 160; *Spiller v. Woburn*, 12 Allen 127.

3. It is charged in the petition, that the acts complained of were wrongfully, oppressively and maliciously done. The authority is overwhelming that ministerial officers, exercising discretionary powers, or acting in a judicial capacity, are liable for acts unlawfully done with corrupt motives and with malice. *Reed v. Conway*, 20 Mo. 23; S. C. 26 Mo. 25; *Wilkes v. Dinsman*, 7 How. 130, 131; *Jenkins v. Waldron*, 11 Johns. 121; *Vanderheyden v. Young*, 11 Johns. 150; *Martin v. Mott*, 12 Wheat. 31; *Dinsman v. Wilkes*, 12 How. 404; *Griffin v. Rising*, 11 Met. 339; *Stephenson v. Hall*, 14 Barb. 222; *Donahoe v. Richards*, 38 Me. 394; *Schoettgen v. Wilson*, 48 Mo. 253; *McCutchen v. Windsor*, 55 Mo. 153.

4. The plaintiff was not expelled for any act done in the school, or while said school was in session, or at any time when he was under the control of the school officers; but he was expelled because he had attended a social party,

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at night and after school hours, and this with the consent of his parents with whom he then resided. Upon this point we urge that the said school board and teacher, in expelling him for the cause alleged, acted unlawfully, without any authority, and wholly beyond the scope of their jurisdiction. *Morrow v. Wood*, 35 Wis. 59; *Murphy v. Board of Directors*, 30 Iowa 429; *Weaver v. Devendorf*, 3 Denio 120; *Reed v. Conway*, 20 Mo. 52.

*Draffen & Williams* with *James E. Hazel*, for defendants in error.

1. The board of directors were authorized to make the rule complained of, and for the enforcement thereof they cannot be made liable in damages. Wag. Stat. 1264, § 8; *Donahoe v. Richards*, 38 Me. 376.

The rule is in no manner inconsistent with the law of the land, and its propriety and reasonableness within that limit was confided by the Legislature to the discretion of the school board. It contravenes no law of the State, written or unwritten, and the wisdom of its enforcement is left to the judgment of the board. Courts will not undertake to revise and review the rules adopted for the government of schools by the proper officers. The law has confided that duty to them, and they alone can exercise it. Nor can any one under our system of government suffer long from the enforcement of any regulation which the community believes to be unwise, for by the power of election a change can be made whenever the public are displeased, and in this way any evil complained of should be corrected, and to this tribunal all such questions should be remanded. If, however, it was within the province of the courts to review and pass upon the reasonableness of the rule in question, we insist that it was an eminently wise and proper one, and instead of being a ground for complaint against the defendants, it should be a matter of commendation to them for their interest in the welfare of their scholars.

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2. Even if it should be held that defendants had no power to make the rule in question, yet they were acting as *quasi* judicial officers and for errors of judgment are not liable to an action for damages. True, the petition uses the words "willfully, maliciously and oppressively," but the facts are stated in detail, and they negative the idea of malice. The rule is set out, and the only complaint is that it was enforced. It is not charged that it was maliciously made, or that it was made for the purpose of excluding plaintiff, but on the contrary, that it was made for the government of the whole school.

HENRY, J.—The cause was commenced and final judgment entered upon demurrer to second amended petition in the circuit court of Moniteau county, Missouri. The record consists of the second amended petition, the separate demurrer of Snodgrass and Redmond, and the separate demurrer of Frederick, and the judgment of the court upon the demurrers.

The petition avers that Joseph F. Dritt is a minor, under 21 years of age—that John B. Dritt was appointed his next friend by the clerk of the circuit court of said county; hence this suit is prosecuted to the use of Joseph F. Dritt, by his next friend, John B. Dritt. The petition further avers that prior to the accruing of plaintiff's cause of action the town of Tipton, in said county, had been duly incorporated, and a plat thereof filed and duly recorded in the recorder's office of said county; and that prior to the accruing of plaintiff's cause of action, by virtue of the laws of the State of Missouri authorizing cities, towns and villages to organize for school purposes, the said town of Tipton was organized as a single school district, and that it has been to this date an acting organization as such; that on, to-wit, the 20th day of January, 1875, and for a long time prior and since that date, the defendants, Isaac Snodgrass and William Redmond, together with four other persons, each of whom, then being citizens and electors

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within said school district, were duly elected and qualified school directors within said school district, and that they were for the period aforesaid the school directors of said school district; that the said school directors, by virtue of the power and authority in them vested by law, had, prior to the date last aforesaid, established in said school district a school for the education of all the white children residing therein, between the ages of five and twenty-one years, and had employed as the teacher of said school, the defendant, P. A. Frederick, and that the said P. A. Frederick was a legally qualified teacher to teach said school; that for a long period of time prior and subsequent to the date last aforesaid, the said school was in session with the said P. A. Frederick as teacher therein, for the purpose of the instruction and education of the youth aforesaid within said school district, in the branches of education then being taught in said school, to-wit: reading, writing, spelling, orthography, grammar, geography, arithmetic and history; that at the date last aforesaid, and during all the time subsequent thereto to this date, plaintiff has resided in said school district; that he was during all the time aforesaid, and is now, over 5 and under 21 years of age; and that he was then and is now, under the law, entitled to attend said school as a pupil, and be instructed in the various branches of education then and there being taught in said school; that prior to the date aforesaid, and for a long period of time, and up to the said 20th day of January, 1875, he was a regular pupil and scholar in said school, and received instruction in the various branches of education aforesaid; that under the law of the State he had a right to continue in said school as a pupil, and that it was not only the duty of the directors to permit him to attend said school during all the time aforesaid, but to protect him in so doing; that on, to-wit, the 20th day of January, 1875, and while he was a pupil of said school and being instructed in the several branches of learning then being taught therein, the said Isaac Snodgrass and William Redmond, together with

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the other members of the school board aforesaid, and the said P. A. Frederick, teacher of said school, not regarding their duties aforesaid, wrongfully, illegally, oppressively, willfully and maliciously, and in abuse of their authority as school directors and teacher aforesaid, did expel this plaintiff from said school for the following reason, and none other, to-wit: That the said plaintiff did, previous to the date aforesaid, in the evening, after said school had been dismissed for the day, attend a party composed of the young people of said town, and participate in the amusements thereof; that the said board of directors and teacher of said school had made a rule for the government of said school, prohibiting the scholars from attending such parties during the continuance of said school, and that it was for a violation of this rule that he was expelled; that the said party was made up of invited guests, and that their conduct was strictly innocent, inoffensive and moral, tending only to social culture; that plaintiff was at the time about 17 years of age, and that he attended said party with the permission of his father and mother, with whom he at the time lived; that he had a right to attend said party, and that the defendants had no right or authority to dictate to or control him in the premises, and that the act aforesaid of said defendants, was an abuse of any authority conferred upon them by the laws of this State; that the defendants have in manner and form aforesaid, ever since, to this date, prohibited the plaintiff from attending said school, whereby the plaintiff, by the illegal, unlawful, willful, oppressive and malicious acts of defendants, has been deprived of the benefits of said school, and the instruction aforesaid therein, and asks damages in the sum of \$1,000. The petition is signed by Joseph F. Dritt, by Rice and Smith, his attorneys.

The grounds of demurrer are, for Snodgrass and Redmond:

1st. Petition does not state facts sufficient to constitute a cause of action.



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2nd. It appears upon the face of said petition that the defendants were directors of said school district, and were invested with discretionary authority to make and enforce all needful rules and regulations for the government and control of said school, and they cannot be made liable to plaintiff under the allegations of the petition.

3rd. Because it appears upon the face of the petition that the plaintiff has not legal capacity to sue by attorney, and he does not appear by next friend.

Grounds of demurrer on the part of Frederick:

1st. Petition does not state facts sufficient to constitute a cause of action against defendant.

2nd. It appears upon the face of said petition that the defendant was the teacher in the public school in the town of Tipton, employed by the board of education of said town, and as a matter of law he is not liable to plaintiff upon the facts stated in the petition—said school being under the control and management of the board of education, and not of himself.

3rd. It appears upon the face of the petition that plaintiff has not legal capacity to sue by attorney, and he does not appear by next friend.

The court sustained each of said demurrers, and entered up final judgment thereon against the plaintiff for costs; whereupon the plaintiff brings the cause to this court by writ of error.

By Sec. 8, Wagner's Stat., page 1264, it is provided, that the board of directors "shall have power to make and enforce all needful rules and regulations for the government, management and control of such schools and property, as they shall think proper, so that the same shall not be inconsistent with the laws of the land; and, generally, to do all lawful acts which may be proper and necessary to carry fully into effect the purposes of the act." It appears, in this case, from the petition, that the directors had made a rule for the government of said school, prohibiting its pupils from attending social parties; that the plaintiff

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had violated said rule, with the consent of his father and mother, and for so doing was expelled from the school, and he seeks to recover damages against the teacher and a portion of the directors for such expulsion. Is the action maintainable? Plaintiff cites many authorities as sustaining his position, and we have carefully examined them, and also those cited by the defendant, and are fully satisfied that the weight of authority is against the plaintiff.

School directors are elected by the people, receive no compensation for their services, are not always, or frequently, men who are thoroughly informed as to the best modes of conducting schools. They are authorized, and it is their duty to adopt reasonable rules for the government and management of the school, and it would deter responsible and suitable men from accepting the position, if held liable for damages to a pupil expelled under a rule adopted by them, under the impression that the welfare of the school demanded it, if the courts should deem it improper. They are to determine what rules are proper, and who shall say that the rule adopted in this case was harsh and oppressive? I might think it was; wiser men would maintain that it was proper and right, that pupils attending social parties are liable to have their minds drawn off from their studies, and thus to be retarded in their progress; but whether the rule was a wise one or not, the directors and teacher are not liable to an action for damages for enforcing it—even to the expulsion of a pupil who violates it. While this court might, on mandamus to compel the board and teacher to admit a pupil thus expelled, review the action of the board, and pass upon the reasonableness of the rule, which we do not, however, decide here, yet the doctrine that the courts could do this, is very different from that which would hold the directors liable in an action for damages for enforcing a rule honestly adopted for the maintenance of discipline in the school. That such an action is not maintainable, is fully established by *Donahoe v. Richards*, 38 Me. 391; *Spear v. Cummings*, 23 Pick.

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224; *Stephenson v. Hall*, 14 Barb. 222. *Hodgkins v. Rockport*, 105 Mass. 475, does not support the position for which it is cited by plaintiff. By the law of that State, the school committee has the general charge and superintendence of all the public schools in the town. The plaintiff, a minor, was excluded from school for alleged misconduct, and sued to recover damages for such exclusion.

Morton, J., speaking for the court, said: "This general power, (to superintend schools, &c.,) by necessary implication, includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools, and also the power to exclude a child from school for sufficient cause. And when a scholar is guilty of misconduct, which injuriously affects the discipline and management of the school, we think the law vests in the school committee the power of determining whether the welfare of the school requires his expulsion." Again, he said: "He was guilty of acts of misconduct, which, if persisted in, it is clear might seriously interfere with the discipline, and impair the usefulness of the school. Whether they had such an effect upon the welfare of the school as to require his expulsion, was a question for the committee, and upon which their action is conclusive."

The case of *Morrow v. Wood*, 35 Wis. 61, involved no principle in question here. It was an action for malicious prosecution, by a teacher, against the parent of a pupil whom she had flogged for having her arrested for an assault and battery upon the child. The court held that the assault and battery was unjustifiable, and that, therefore, she could not maintain her action. Certain studies are required to be taught in the public schools of that State by statute, but the court held, as a matter of law, that the father "had a right to make a reasonable selection from the prescribed studies for his child to pursue, and this can not possibly conflict with the equal rights of other pupils." There the father desired his child not to study geography.

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The plaintiff (the teacher) required the boy to study geography, being fully advised that his father had forbidden the son from doing so. The boy refused to obey her in this respect, and for this was flogged. *Murphy v. The Board of Directors*, 30 Iowa 430, was a proceeding by mandamus to compel defendant to allow plaintiff to attend school, and is no authority for the doctrine that a board of school directors is liable in damages for the expulsion of a pupil for a violation of a rule adopted by the board for the government of the school. While some respectable courts have held otherwise, the weight of authority sustains the conclusion we have reached.

In *Dinsman v. Wilkes*, 12 Howard 404, Ch. J. Taney, delivering the opinion of the court, said: "But the fact to be ascertained in this case is whether, in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in the nature of a judicial discretion, he acted from improper feelings, and abused the power confided to him, to the injury of the plaintiff."

In *Weaver v. Devendorf*, 3 Denio 118, plaintiff sued a board of assessors for refusing to make an allowance or deduction in assessing his property, he being a minister, and because his property was assessed at a higher rate than that of others. The court held that the action would not lie, and Beardsly, J., said: "This case might be disposed of on narrow ground, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff, or of any one else; and surely it will not be pretended that they were liable for a mere error of judgment. But I prefer to place the decision on the broad ground that no public officer is responsible, in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it."

We extract copiously from these cases because they are cited by plaintiff's counsel as sustaining their view,

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while we think that they afford them no support whatever.

2 The petition alleges that the defendants illegally, wrongfully, oppressively, willfully and maliciously, expelled the plaintiff, and then proceeds to state the circumstances under which the expulsion took place, viz: the existence of the rule, and plaintiff's violation of it. The adoption of the rule is not alleged to have been prompted by malice, and if the plaintiff violated the rule, it matters not what may have been the feelings of the defendants toward him, if they enforced it in the usual and ordinary way, and the contrary is not alleged. While malice is alleged, the facts stated in the petition show that there was no such malice as gave plaintiff a cause of action against defendants for his expulsion.

We are not to be understood as holding that a board could not adopt a rule for the enforcement of which they would be liable for damages. If they should declare that for certain misconduct the teacher should inflict upon the bare back of the pupil thirty-nine lashes, well laid on, or any other rule palpably unreasonable and unauthorized, they probably could not shield themselves against an action for damages by a pupil, under the power given them to adopt reasonable rules for the government of the school. But even this we will not now decide, for "sufficient unto the day is the evil thereof."

The judgment is affirmed.

AFFIRMED.

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NORTON, J., CONCURRING.—The directors of a school district are invested with the power and authority to make and execute all needful rules and regulations for the government, management and control of such school as they may think proper, not inconsistent with the laws of the



land. Under the power thus conferred, the directors are not authorized to prescribe a rule which undertakes to regulate the conduct of the children within the district, who have a right to attend the school, after they are dismissed from it and remitted to the custody and care of the parent or guardian. They have the unquestioned right to make needful rules for the control of the pupils while at school, and under the charge of the person or persons who teach it, and it would be the duty of the teacher to enforce such rules when made. While in the teacher's charge, the parent would have no right to invade the school room and interfere with him in its management. On the other hand, when the pupil is released and sent back to his home, neither the teacher nor directors have the authority to follow him thither, and govern his conduct while under the parental eye.

It certainly could not have been the design of the Legislature to take from the parent the control of his child while not at school, and invest it in a board of directors or teacher of a school. If they can prescribe a rule which denies to the parent the right to allow his child to attend a social gathering, except upon pain of expulsion from a school which the law gives him the right to attend, may they not prescribe a rule which would forbid the parent from allowing the child to attend a particular church, or any church at all, and thus step *in loco parentis* and supersede entirely parental authority? For offenses committed by the scholar while at school, he is amenable to the laws of the school; when not at school, but under the charge of the parent or guardian, he is answerable alone to him.

A person teaching a private school may say upon what terms he or she will accept scholars, and may demand, before receiving a scholar to be taught, that the parents shall surrender so much of his or her parental authority as not to allow the scholar, during the term, to attend social parties, balls, theaters, &c., except on pain of expulsion. This would be a matter of contract, and no

one has a right to send a scholar to such a school except on the terms prescribed by those who teach it.

2 This is not so in regard to public schools, which every child within school age has a right, under the law, to attend, subject while so attending to be governed by such needful rules as may be prescribed. When the school room is entered by the pupil, the authority of the parent ceases, and that of the teacher begins; when sent to his home, the authority of the teacher ends, and that of the parent is resumed. For his conduct when at school, he may be punished or even expelled, under proper circumstances; for his conduct when at home, he is subject to domestic control. The directors, in prescribing the rule that scholars who attended a social party should be expelled from school, went beyond their power, and invaded the right of the parent to govern the conduct of his child, when solely under his charge.

My concurrence in the above opinion is based upon the sole ground that malice, oppression and willfulness on the part of the defendants are not sufficiently charged in the petition.

Judges NAPTON, HOUGH and C. J. SHERWOOD concur in the views above expressed.

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Chapman v. Callahan.

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CHAPMAN, *Adm'r of Nutter, Plaintiff in Error* v. CALLAHAN  
*et al.*

- 1 **Who are Proper Parties to a Vendor's lien suit.** An administrator sold and conveyed several parcels of land, part of a larger tract, and received the purchase money for the same. His intestate had previously conveyed the entire tract to another party. In a suit by the administrator to enforce a vendor's lien against the entire tract for the purchase money due upon this sale; *Held*, that the purchasers at the administration sale were proper parties defendant.
2. **Vendor's Lien: DEFENSE OF FRAUDULENT CONVEYANCE.** To defeat such a suit, the purchasers at the administration sale may show that no debt was incurred by the grantee in the deed from the intestate, and for this purpose will be allowed to prove that this deed was made without consideration, and in order to hinder and defraud the creditors of the intestate.
3. ———: **ESTOPPEL BY PLEA: HUSBAND AND WIFE.** A defendant in a vendor's lien case cannot, after a verdict against him upon a plea of payment, avail himself of evidence that he had never contracted to pay for the land, given upon an issue of non-assumpsit made between the plaintiff and other defendants in the case; and where husband and wife are defendants, and the husband has no other interest than as tenant by the courtesy in the land of which his wife is owner, a verdict so rendered affects his interest equally with hers, although he may, in a separate answer, have pleaded non-assumpsit, and, upon a trial, the plea may have been found in his favor.

*Error to Jackson Circuit Court.*—HON. SAMUEL L. SAWYER,  
Judge.

This was a suit brought by Chapman as administrator of Samuel W. Nutter, deceased, against Lizzie A. Callahan, a sister of the deceased, and James M. Callahan, her husband, to enforce a vendor's lien against a tract of land in Lafayette county. The case was taken by change of venue from Lafayette to Jackson county. The petition alleged that the land had been conveyed by plaintiff's intestate to Mrs. Callahan for the sum of \$13,000, and that although the deed acknowledged receipt of the money, yet, in point of fact, no part of it had ever been paid.

Defendants answered, admitting the purchase, but

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averring payment in full. The court submitted to a jury the question whether Mrs. Callahan had ever paid the purchase money, and the jury returned a verdict in the negative. After the rendition of this verdict, on motion of the original defendants, and against the objection of plaintiff, Hall and Jordan were made co-defendants, and on his own motion, James M. Callahan was permitted to file a separate answer, but Mrs. Callahan was not permitted to answer further. Hall and Jordan filed separate answers, each admitting the sale and conveyance to Mrs. Callahan, but denying that she ever promised to pay for the land, and averring that the deed was made by Nutter, and was accepted by her with intent to hinder, delay and defraud his, Nutter's, creditors; also, averring that they had purchased portions of the land at a sale made by plaintiff, as administrator of Nutter, under orders of the probate court, and that the money paid by them had been applied by plaintiff to the payment of the debts of the intestate. Defendant, James M. Callahan, also set up the fraudulent character of the conveyance to his wife, but disclaimed any participation in the fraud, or any knowledge of it, until the facts were developed on the trial before the jury, the transaction having occurred before his marriage.

Plaintiff replied to these answers, denying all the allegations of fraud, and charging Jordan with combining with Callahan and wife in the matter of the alleged administrator's sale. The deed was executed in July, 1868. Previous to that time a suit for divorce had been brought against Nutter by his wife, and an order had been made in her favor, allowing her \$250 alimony *pendente lite*. Nutter was killed in October, 1868, and plaintiff was appointed his administrator.

At the trial several witnesses testified that deceased had owed them small sums ranging from \$10 to \$60 for groceries, clothing, &c., which they had tried, without success, to get paid during the summer and fall of 1868. Plaintiff testified that a few days after the death of Nut-

ter, he, in company with witnesses, went to his late residence for the purpose of making an inventory of the effects. Mrs. Callahan was there: she had been living with him; she pointed out the property inventoried, and said it was all, that deceased had no other property, that she knew of no money. He further testified that the proceeds of the sale to Hall and Jordan had been used to pay the debts of the estate, amounting to some \$6,000; that Mrs. Callahan's father died in 1865, leaving her 200 acres of land, some household furniture, a few farm animals and \$1,000 in money. The inventory made by the witness consisted of a small amount of personalty only.

Judge Carr testified that he accompanied plaintiff when he made the inventory; that Mrs. Callahan pointed out a few articles only as the property of deceased; that she was engaged in no business; and deceased was engaged in none other than farming, not in any kind of speculation.

Another witness testified that she had been the wife of Samuel W. Nutter; that Mrs. Callahan had lived with them; that in 1868 Mrs. Callahan owned the property left her by her father, but had no income from it, and always said she had no means of paying board or building on her own land.

Another witness testified that he lived near deceased, and that after July, 1868, deceased, on one occasion, came to him to borrow money.

Thomas Wood, a nephew of Mrs. Callahan, testified that in April, 1868, he was at Nutter's house, and saw Mrs. Callahan open a trunk; there was a large pile of money in it; a while before Nutter's death, he saw him with a large amount of money in his pocket book; he said he had sold his farm, and got the money; that Nutter often told him this, giving as his reason for selling his fear of being killed, and saying he intended to move out of the country; Mrs. Callahan was in possession of the farm.

Thomas Pollard testified that he had once been a tenant of Nutter; in 1868 he had applied to Nutter to rent



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the same place again; Nutter said he would like to, but had sold to Mrs. Callahan; he would try to get her to let witness have it back again: he said. "All I now have is a pocket full of money; If you want some, I will let you have it." He had his pocket full at that time; his outside coat pocket was plump full of loose money; saw him pulling it out of his inside coat pocket too.

Dennis O'Reilly testified that in the fall of 1868 he had applied to Nutter to rent land, and had received the same answer as the last witness; that he afterwards got the land from Mrs. Callahan, who wrote the lease herself.

Thos. Adamson sheriff testified that he had levied on a buggy and horse as the property of Nutter, that he had denied the ownership, saying he had sold everything to Mrs. Callahan; that she afterwards replevied them.

Several attorneys testified that Nutter owed them for professional services in his divorce and other cases; that they had made attempts to collect their accounts in the spring and summer of 1868, but Nutter would laugh and say he had nothing to pay with just then; that they had subsequently brought attachment suits, and recovered the amounts from his administrator.

Xenophon Ryland testified that he was present at the administrator's sale, and that Jordan and James M. Callahan seemed to be acting in concert.

Mrs. Callahan testified: I never assented to the sale of any portion of said lands for the purpose of paying debts. Plaintiff suggested this course, but I told him I had bought the lands and paid my money for them, and I would not consent to any of them being sold for this purpose. I bought the property of my brother, and paid him all the money for it at once. I paid him seventeen thousand dollars in cash. I paid him thirteen thousand dollars for the lands and four thousand for the personal property. The deed for the lands was made out and delivered to me and filed for record before I paid the money, and the bill of the personal property was also delivered to me before I paid

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the money. On cross-examination, she stated: I paid the money at home. The deed was executed in Lexington, and filed for record on the same day. No money was paid at the time the deed was executed. I cannot tell how many days it was after the deed was executed before I paid the money, but it was not many. A man by the name of Daniel Hogan was present when the money was paid, but no one else. Hogan lived near us. My brother went and brought him to our house to witness the payment of the money. I went into another room and brought out \$13,000 and counted it out for the land, and then went and got \$4,000 more and counted it out for the personal property. I had none of this money at the time I went to St. Louis in the fall of 1867, or when I came back in the spring of 1868.

Question by plaintiff: State where you got the \$17,000 which you say you paid to your brother? Counsel for defendants here suggested that if the witness could not answer this question without criminating herself, she would be excused for not answering it, and the court then instructed the witness accordingly. Whereupon the witness testified as follows: I cannot answer this question, or state where I got any portion of this \$17,000 without criminating myself.

Daniel Hogan testified, that he came one day to Nutter's house and he had a deed which he said he had had written in Lexington on the day before. She brought in some money and paid it. I don't know how much it was. He said it was paid for the land and the stock and household furniture. The money was paid in the house where they lived. I did not count it. I don't know whether it was good, bad or indifferent. I heard them saying that it was thirteen thousand dollars for the land, and four thousand dollars for the stock and household and kitchen furniture. This payment occurred on Sunday in the parlor. They were in the sitting room when I went there, and they asked me to go into the parlor with them. No one else was pres-

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ent. They were making two payments, one in the morning and one in the evening. I can't read, and did not read the deed. They said it was a deed. I saw the money in the morning. I am not certain whether both payments were made in the morning or whether one was made in the morning and one in the evening. I do not know whose money was paid, or who kept it, or what became of it after it was paid. I do not know that any money changed hands and remained changed. I know Richard Carr. He lived a mile south of Wellington, and I expect I said to him there was "damned little" money passed. I didn't know how much it was. They were sitting at a round table. I was sitting at the end of the table. She counted and handed the money to him. I don't know what she did with it, or where he put it. They were so close that what one could handle the other could handle. I heard them counting, but took no heed. I don't know whether it was hundred or one dollar bills. I know a one dollar bill from a five or ten. I don't know a hundred dollar bill. I don't know whether the money was hundred dollar bills, or tens, or ones. I don't know what any of the bills were. They called on me to witness the payment.

It was admitted by the parties, and received in evidence, that at the time of the execution of the deed by intestate to Mrs. Callahan, he was indebted to his father's estate in the sum of \$2,000, for which judgment was rendered against plaintiff, after intestate's death, and paid. It was likewise admitted that the larger portion of the debts allowed against and paid out of intestate's estate accrued before, and were due at the time of the execution of the deed by him to Mrs. Callahan, and that at the time of such execution, a divorce suit was pending against him, in which a judgment for \$250, as alimony, *pendente lite*, had been rendered, and was then unpaid. Upon all the evidence the court found for defendants, and entered judgment accordingly. The plaintiff appealed.

*Botsford & Williams and Lay & Belch* for plaintiff in error.

I. The maxims, *ex turpi causa non oritur actio* and *in pari delicto potior est conditio defendentis* do not apply to actions for the purchase money of goods or lands sold with intent to defraud creditors; and the almost universal construction of the statute of 13 Eliz., Ch. 5, has been that such conveyances are valid between the parties, and as to all the world, except creditors, and can be enforced in all their terms, either in law or equity, and without reference as to whether they are executed or executory, the same as any other contract. *Hawes v. Leader* Cro. Jac. 270; *Yelv.* 196; *Cadogan v. Kennett*, Cowp. 432, 434; *Roberts v. Roberts*, 2 Barn. & Ald. 367; 2 Chitty on Contracts, (11 Am. Ed.,) 1037; *Lenox v. Notrebe*, Hemp. C. C. 251; *Randall v. Philips*, 3 Mason 378; *Hamilton v. Russell*, 1 Cranch 314; *Brooks v. Martin*, 2 Wall. 70; *Nichols v. Patton*, 18 Me. 231; *Thompson v. Moore*, 36 Me. 47; *Andrews v. Marshall*, 43 Me. 272; *Blake v. Williams*, 36 N. H. 39; *Carpenter v. McClure*, 39 Vt. 9; *Roberts v. Lund*, 45 Vt. 82; *Cushwa v. Cushwa*, 5 Md. 44; *Broughton v. Broughton*, 4 Rich. (S. C.) 492; *Lassiter v. Cole*, 8 Humph. 621; *Stanton v. Green*, 34 Miss. 576; *Hoeser v. Kraeka*, 29 Tex. 450; *Davis v. Ramsom*, 26 Ill. 100; *Fitzgerald v. Forristal*, 48 Ill. 228; *Morey v. Forsyth*, Walker's Chan. (Mich.) 465; *Smith v. Mining Co.* 14 Cal. 242; *Lawton v. Gordon* 34 Cal. 36; *Swan v. Scott*, 11 Serg. & R. 155; *Sherk v. Endress*, 3 W. & S. 255; *Murphy v. Hubert*, 16 Penn. St. 50; *Evans v. Dravo*, 24 Penn. St. 62; *Hendrickson v. Evans*, 25 Penn. St. 441; *Drum v. Painter*, 27 Penn. St. 148; *Byrod's Appeal*, 31 Penn. St. 241; *Williams v. Williams*, 34 Penn. St. 312; *Pearsoll v. Chapin*, 44 Penn. St. 9; *Gillispie v. Gillispie*, 2 Bibb 89; *Gilpin v. Davis*, 2 Bibb 416; *Bibb v. Baker*, 17 B. Mon. 292; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Fairbanks v. Blackington*, 9 Pick. 93; *Dyer v. Hamer*, 22 Pick. 253; *Harvey v. Varney*, 98 Mass. 118; *Findley v. Cooley*, 1

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Blackf. 262; *Springer v. Drösch*, 32 Ind. 486; *O'Neil v. Chandler*, 42 Ind. 471; *Clemens v. Clemens*, 28 Wis. 637; *Dietrich v. Koch*, 35 Wis. 618; *Starke v. Littlepage*, 4 Rand. 368; *Harris v. Harris*, 23 Gratt. 787; 1 Story Eq. Jur. (11th Ed.) § 371; *Henderson v. Henderson*, 13 Mo. 151; *Gowan v. Gowan*, 30 Mo. 472; *Wright v. Crockett*, 7 Mo. 127; *Burrows v. Alter*, 7 Mo. 424; *Smoot v. Wathen*, 8 Mo. 522; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Brown v. Finley*, 18 Mo. 378; *Criddle v. Criddle*, 21 Mo. 522; *George v. Williamson*, 26 Mo. 190; *Johnson v. Jeffries*, 30 Mo. 423; *Reid v. Mullins*, 48 Mo. 344. The maxims cited are inapplicable, for the reason given by both Chief Justice Shaw and Chief Justice Dixon, that the transaction as between the parties not being *turpis causa*, there was no wrong between them, equal or unequal. Or, as is well said by Chief Justice Gibson, the party is not allowed to make this defense, not because he is not permitted to plead his own criminality, but because there is no criminality to plead. The sale, therefore, by Nutter to Mrs. Callahan was not void as between them, and plaintiff as Nutter's administrator, has the right to recover the purchase money. Especially so, as Nutter's creditors have been paid in full.

II. Jordan and James M. Callahan, not being either creditors or subsequent purchasers of Nutter, do not stand in a position to set up the fraud. *Russell v. Kearney*, 27 Ga. 96; *Bell v. McCauley*, 29 Ga. 355; Kerr on Fraud & Mist. 228, 229; *Railroad Co. v. Seeger*, 4 Wis. 268; *Bailey v. Tipton*, 29 Mo. 206; *Johnson v. Jeffries*, 30 Mo. 423; *Reid v. Mullins*, 48 Mo. 344; *St. Louis v. Shields*, 52 Mo. 351. Callahan is joined with his wife merely as a nominal party, and his courtesy in the land is subject to plaintiff's lien for the purchase money, the same as though Mrs. Callahan had mortgaged the land before their marriage.

III. The title to the land having been conveyed to Mrs. Callahan, before the administration purchases by Hall and Jordan of Nutter's interest, those purchases were void, and they, having acquired neither title nor possession,



were not necessary parties. *George v. Williamson*, 26 Mo. 190; *Callahan v. Griswold*, 9 Mo. 785; *Delassus v. Poston*, 19 Mo. 425; *Farrar v. Dean*, 24 Mo. 16; *Trent v. Trent*, 24 Mo. 307; *Grady v. McCorkle*, 57 Mo. 172; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Erfort v. Consalus*, 47 Mo. 208.

IV. Every issue tendered by the answer of Mrs. Callahan having been decided against her by the verdict of the jury, and she having been denied permission to amend by setting up the fraud of herself and Nutter, the court erred in rendering a decree in her favor on the issues tendered, and the evidence adduced by the other parties.

A. *Comingo* for defendants in error.

I. Hall and Jordan were not only proper, but were necessary parties. They had purchased from the plaintiff, as administrator, a large part of the lands against which he was seeking to enforce a vendor's lien; and had received deeds, and were in actual possession. Furthermore, the money they had paid, had been used by the plaintiff to pay the debts of intestate. They, therefore, had interests and equities in the premises which it was the duty of the court to protect. *Wag. Stat.*, p. 1000, § 5; *Dillon v. Bates*, 39 Mo. 292. If plaintiff had had a vendor's lien, as he alleged, he might not have been estopped from enforcing it, by the sale he had made under the order of the probate court, in pursuance of his own petition. It is not necessary to determine that question here. It is enough to know that he had once sold the property, or a large part of it, and received the money, and put his vendee in possession, &c. It would be a strange equity that would permit him to sell it again under a vendor's lien, without affording his prior vendee an opportunity to be heard.

II. The finding and judgment of the court were for the right parties. In the first place, the testimony in the cause, not only fails to show that S. W. Nutter retained or intended to retain a vendor's lien, but it utterly fails to

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show that he, at the time of his death, had any claim either in law or equity against his sister. Furthermore, the testimony shows conclusively that he did not retain or intend to retain such lien, and that he did not have any such claim. The remarkable facts and circumstances disclosed by the testimony, conclusively repel the presumption of a lien in favor of S. W. Nutter, the vendor, and utterly annihilate his pretended equities. *Garson v. Green*, 1 John., Ch. 308; *Gilman v. Brown*, 1 Mason 192.

His oft repeated declarations, that the purchase money had been paid, are alone sufficient to repel the presumption of a vendor's lien. Although it may not have been actually paid, it seems he considered and treated the payment made in the presence of the witness Hogan, as an actual payment, and, in view of the facts in the case, he could not, if living, nor will the plaintiff, as his administrator, be permitted to treat it otherwise. The evidence that the conveyance by Nutter to his sister, was made with intent to defraud, hinder and delay creditors and others, is overwhelming. A vendor's lien in the case is therefore impossible. Wag. Stat. 461, § 51, 464, § 66.

The vendor's lien cannot exist if the contract is by statute illegal. *Ewing v. Osbaldistone*, 2 Mylne & Craig 53, 88; *Downing v. Ringer*, 7 Mo. 585; *Hamilton v. Scull*, 25 Ib. 165; *Higgins v. Higgins*, 55 Ib. 346; *Creekmore v. Chitwood*, 7 Bush (Ky.) 317; *Smith v. City of Albany*, 7 Lans. (N. Y.) 14; *Swords v. Owen*, 34 N. Y. 277; *Story on Contracts*, (2 Ed.) p. 539, § 614; *Fowler v. Scully*, 72 Penn. St. 456; *Holt v. Green*, 73 Penn. St. 198; 1 *Story Eq. Jur.*, (4 Ed.) p. 49, § 61.

III. The promise made by defendant, Lizzie A. Callahan, to pay for the land, if such promise was made, was executory, and the facts as shown by the record, demand the application of the maxim, "*In pari delicto, &c.*" The general and almost universal rule is, that as between the parties to a contract entered into for the purpose of defrauding or hindering or delaying creditors and others of their

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just dues or demands, the court will leave the parties where it finds them. They will not undo or in any manner interfere with one that is executed; nor will they enforce one that is either in whole or in part executory. Such is the rule with reference to all illegal contracts, whether rendered so by the common or the statute laws of the land. *Downing v. Ringer*, 7 Mo. 586; *Partlett v. Vinor*, Carthew 252; *Fenton v. Ham*, 35 Mo. 409; *Peltz v. Long*, 40 Mo. 532; *Adams Ex. Co. v. Reno*, 48 Mo. 267; *Hickman v. Benson*, 8 Mo. 8; *Hayden v. Little*, 35 Mo. 418; *Pacific R. R. v. Seely*, 45 Mo. 212; *Harwood v. Knapper*, 50 Mo. 456; *Inhabitants of Worcester v. Eaton*, 11 Mass. 375; *Smith v. Hobbs*, 1 Fairfield (Maine) 71; *Nellis v. Clark*, 20 Wend. 24; *Church v. Muir*, 33 N. J. 319; *McClure v. Purcell*, 3 A. K. Marshall 61; *Norris v. Norris*, 9 Dana 318; *Smead v. Williamson*, 16 B. Monroe 492; *Marksbury v. Taylor*, 10 Bush (Ky.) 520; *Bailey v. Milner*, 35 Georgia 330; *Adams v. Barrel*, 5 Ib. 404; *Green v. Godfrey*, 44 Maine 25; *Andrews v. Marshall*, 48 Ib. 26; *Hoover v. Pierce*, 26 Miss. 627; *Goudy v. Gebhart*, 1 Ohio St. 262; *Lewis v. Welch*, 14 N. H. 294; *Boden v. Murphy*, 10 Ala. 804; *Walton v. Bonham*, 24 Ib. 513; *Murphy v. Hubbert*, 16 Penn. St. 50; *Smith v. City of Albany*, 7 Lans. N. Y. 14; *Sweet v. Tinslar*, 52 Barb. 271; *Stanley v. Nelson*, 28 Ala. 514; *Milton v. Hayden*, 32 Ala. 30; *Bull v. Harragan*, 17 B. Monroe 349; *Wheeler v. Russell*, 17 Mass. 258; Roberts on Fraudulent Conveyances pp. 442 to 451; Bump on Fraud. Con. 442 to 452; Chitty on Contracts, (7 Am. Ed.) 657, 692 to 698, and notes, 971 to 978, and notes; Broom's Legal Maxims, (5 Am. Ed.) 495 to 499, top paging, also 484 to 489; *Collins v. Blantern*, 2 Wils. 347; *Keir v. Leeman*, 6 Q. B. 308; 9 Ib. 371; *Armstrong v. Armstrong*, 3 Myl. & Keen. 64; *Holman v. Johnson*, Cowper 343; *Jackson v. Duchaire*, 3 T. R. 552; *Higgins v. Pitt*, 4 Exch. 315; *Simpson v. Bloss*, 7 Taunt. 246; *Mallalieu v. Hodgson*, 16 Q. B. 681.

*H. C. Wallace* for defendant in error, Hall.

John Hall has nothing in common with the other defendants in this case, and only asks to be protected against any vendor's lien being enforced against the forty acres purchased by him of plaintiff at the administrator's sale. On the plainest principles of equity plaintiff is estopped to claim a lien against this land, having once sold it and received the money for it. If the court should decree that the lien be enforced against Hall's forty, then he prays that he may be subrogated to the lien, and the plaintiff may be ordered to pay him out of the proceeds of the sale the amount of his purchase money with interest.

HENRY, J.—In allowing Hall and Jordan to be made parties defendant, the court committed no error. Two hundred of the six hundred acres of land, against which plaintiff is seeking to enforce a vendor's lien, had, by him as administrator of the vendor's estate, been sold and conveyed to Hall and Jordan, who were in possession thereof under that conveyance. Whether the title which they acquired by purchase from the administrator be good or bad, they had a sufficient estate in the land to be materially interested in the result of the suit, such an interest as warranted the court in permitting them to become parties defendant.

Each of them in his answer denies that Mrs. Callahan owed or ever promised to pay to plaintiff's intestate any sum of money whatever for the lands conveyed to her by him, and alleges that it was not a real but a pretended sale, the sole purpose of both grantor and grantee having been to defraud the creditors of the grantor. It has been held in this State in the cases of *Hamilton v. Scull's Admr.*, 25 Mo. 166; *Fenton v. Ham*, 35 Mo. 410, and *Harwood v. Knapper*, 50 Mo. 456, that in a suit for the purchase money the vendee of goods, or the grantee of lands, may plead

and successfully defend himself, on the ground that the sale was made to hinder and defraud creditors.

Speaking for myself, and not for my associates, I think the weight of authority and reason against that doctrine, but in the case at bar the evidence of the fraudulent character of the conveyance was admissible, on the part of Jordan and Hall, to show that no debt was incurred by the grantee. They did not claim under the deed from Nutter to Mrs. Callahan, but adversely to it, and nothing in that deed estopped them from pleading the truth, even though it contradicted the deed.

If Mrs. Callahan incurred no debt by the transaction between her and Nutter, there could be no vendor's lien; and that she did not agree to pay any sum of money to Nutter for the land, and that it was understood between her and Nutter that by accepting that conveyance, she came under no obligation to him to pay the purchase money, the evidence leaves no room for doubt.

The deed states the consideration to have been \$13,000, but in the deed the grantor acknowledges its receipt. No note or other written evidence of her indebtedness, is taken by the grantor from the grantee, no promise to pay is proven, and to divers persons, at different times and places he stated that Mrs. Callahan had paid him in full for the land. In the presence of a witness, at their residence, they performed the idle ceremony, she of paying, and he of receiving a sum of money which they then stated was the purchase money for the land. While a jury might have found from the evidence that Mrs. Callahan never paid the amount of purchase money specified in the deed, we think that no jury could have found, had that issue been submitted, that she ever agreed to pay that or any other sum. The evidence establishes clearly that it was a conveyance made for the sole purpose of defrauding the creditors of Nutter.

Whether Nutter's wife, who had sued him for a divorce and had procured an allowance of alimony *pendente*



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*lite* then unpaid, is to be regarded as a creditor within the meaning of the statute, is a question which need not be determined, for whether the deed was made to defraud others who had claims against him, or to embarrass his wife in her divorce suit, the evidence shows that Mrs. Callahan incurred no obligation to pay any sum of money for the land. These remarks are exclusively applicable to the case betwixt the plaintiff and the defendants Hall and Jordan.

As to the other four hundred acres, a different question is presented. Mrs. Callahan admits in her answer that she did agree to pay Nutter \$13,000 for the lands, but avers that she paid it to Nutter in his life time. She does not allege fraud in the transaction, but that the conveyance was made in good faith, and that she paid a valuable and an adequate consideration. She could not avail herself of the evidence on the issue made between the plaintiff and Hall and Jordan, as to her promise to pay purchase money for the land. Her answer admitting that she had agreed to pay it excludes her from the benefit of the evidence on that issue. *Capital Bank v. Armstrong*, 62 Mo. 65. Admitting that under the decisions of this State, *supra*, she could have relied upon the fraud in the conveyance as a defense to the action, she did not, nor could Hall and Jordan, or her husband, Callahan, make that defense for her. Her husband, in his separate answer, relies upon the fraud in the conveyance, but he is in privity with his wife, claims under her, and his interest in the land as tenant by the courtesy, or his life estate as husband, is subject to any liens with which the lands were affected before their inter-marriage.

With the concurrence of the other judges, the judgment is reversed, and the cause remanded to be proceeded with in conformity to this opinion.

REVERSED.

Galway v. Shields.

GALWAY *et al.* v. SHIELDS, *Appellant.*

1. **Statute of Frauds:** VERBAL CONTRACT FOR THE PURCHASE OF LAND : WHEN MONEY OR PROPERTY PAID THERE N CANNOT BE RECOVERED. No action can be maintained to recover back money or property, which has been paid upon a verbal contract for the purchase of land, if the vendor is willing to execute the contract on his part.
2. **Case Adjudged.** In an action for the value of goods sold and delivered, no recovery can be had, if it appears that such goods were delivered pursuant to a verbal agreement that the price therefor was to be paid in specific land to be conveyed by the buyer to the seller, and the buyer has offered and is ready and willing to comply with his part of the agreement.

*Appeal from St. Louis Court of Appeals.*

This was an action for the value of goods sold and delivered by respondents to appellant. The goods were delivered in pursuance of a verbal contract, by which payment therefor was to be made in certain real estate in the city of St. Louis, at a specific valuation, to be conveyed to respondents by appellant. A proper deed of the real estate had been executed and tendered to respondents, but was by them refused. The cause was tried by one of the judges of the St. Louis circuit court without a jury, and judgment was rendered in favor of respondents for the value of the goods, in the sum of \$4,253.85. This judgment was, on appeal, affirmed in general term and also by the St. Louis Court of Appeals.

*Gottschalk* for appellant.

1. Respondents sell merchandise to appellant, which is to be paid for in land; they then deliver the merchandise, and turn round and refuse to receive the land. Can they do this, and will the law tolerate such conduct? Sug. on Vend., (8th Am. Ed.,) Vol. 1 p. 231, note, Chap. 4, Sec. 7; *Lane v. Schackford*, 5 N. H. 130; *Shaw v. Shaw*, 6 Vt. 69; *Collier v. Coates*, 17 Barb. 471; *Dowdle v. Camp*, 12 Johns. 451; *Philbrook v. Belknap*, 6 Vt. 383; *Crane v.*

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*Gough*, 4 Md. 333; *McDonald v. Lynch*, 59 Mo. 350; *Self v. Cordell*, 45 Mo. 345; *Kratz v. Stocke*, 42 Mo. 354.

*Finkelnburg & Rassieur* for respondents.

1. Payment, even if in full discharge of the contract, will not justify equitable relief by the enforcement of specific performance of a parol contract for the purchase of land. Payment is not deemed such part performance of the contract as will take the case out of the statute of frauds. *Bean v. Valle*, 2 Mo. 139; *Chambers v. Lecompte*, 9 Mo. 569; *Johnson v. McGruder*, 15 Mo. 365; *Tibeau v. Tibeau*, 19 Mo. 78; *Despain v. Carter*, 21 Mo. 331; *White v. Watkins* 23 Mo. 423, 428; *Charpiot v. Sigerson*, 25 Mo. 63; *Dickerson v. Chrisman*, 28 Mo. 134; *Young v. Montgomery*, 28 Mo. 604; *Price v. Hart*, 29 Mo. 171; *Tatum v. Brooks*, 51 Mo. 148; *Bowles v. Wathan*, 54 Mo. 262; *Ells v. Pacific R. R.*, 51 Mo. 204.

HOUGH, J.—The only question presented by the record in this case is, whether a person who has paid money or property, upon a verbal contract for the purchase of lands, can maintain an action to recover back the money or the value of the property so paid, although the vendor of the land, to whom the money or property has been paid, is willing to execute the contract on his part.

This question was decided by the Court of Appeals in the affirmative. We do not controvert the doctrine on which that court founded its opinion, that the payment of the purchase money is not such part performance as will take a verbal contract for the sale of lands out of the scope of the statute of frauds; that rule is now thoroughly established. But the relations of the parties in the case at bar are not such as to warrant the invocation of that rule. It will readily be conceded, that if the plaintiffs here were seeking to enforce the parol contract against the defendant, the mere fact that he had paid the purchase money, would not entitle him to a decree for specific performance;

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and we do not understand the authorities cited by the learned judge who delivered the opinion of the Court of Appeals to go further than this. In cases like the present, however, a different rule prevails.

In *Coughlin v. Knowles*, 7 Met. (Mass.) 57, it was held that "an oral contract for the sale of land is not utterly void; and therefore a party who advances money on such contract, cannot recover it back, if the other party is able and willing to fulfill the contract on his part." This decision was affirmed in *Wetherbee v. Potter*, 99 Mass. 361. In *Sims v. Hutchins*, 8 Smeedes & Mar. 331, Chief Justice Sharkey said: "That the contract was not in writing may be good ground of defense, when specific performance of the contract is sought against the vendor, for whose benefit the statute was passed; but if the vendor is willing to perform, the price paid cannot be recovered back." To the same effect are *Shaw v. Shaw*, 6 Vt. 69; *Philbrook v. Belknap*, ib. 383, and *Hawley v. Moody*, 24 Vt. 605.

In *Lane v. Shackford*, 5 N. H. 130, the opinion of the court on this subject was expressed in the following strong and emphatic language: "If one man contracts with another to perform labor, and receive as a compensation the conveyance of a particular tract of land, although the contract to convey the land is not a proper foundation for an action, yet still common honesty and fair dealing require that he shall not be at liberty to refuse the land and demand money, until the other party has refused to execute the contract." *Richards v. Allen*, 17 Maine 296, and *Bedinger v. Whittemore*, 2 J. J. Marshall 563, announce the same doctrine in the most explicit terms.

In *Collier v. Coales*, 17 Barb. 473, Johnson, J., after citing a number of cases in support of the foregoing rule said: "I doubt whether any well considered case can be found in the courts of this country, where the rule above laid down has been denied or even doubted."

Browne in his treatise on the Statute of Frauds, (Ed. 1870,) § 122, says: "The right in the vendee of land by

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verbal contract, to recover what money or other consideration he has paid, is clearly confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part."

In the case of *McDonald v. Lynch*, 59 Mo. 350, it appeared that the plaintiff and the defendant agreed upon a sale and purchase of a lot in the city of St. Louis, at a price named, and plaintiff paid the defendant \$50 to bind the bargain. The parties differed as to what the contract was, as to a certain incumbrance on the land, and the plaintiff brought suit for the \$50 paid by him.

NAPTON, J., delivering the opinion of the court, said: "There is no doubt, that notwithstanding the Statute of Frauds, if the defendant offered to comply with the parol contract, the plaintiff had no right to recover the \$50 advanced."

In view of the foregoing authorities we cannot concur in the opinion of the Court of Appeals, and its judgment, and that of the circuit court will, therefore, be reversed and the cause remanded. The other judges concur, except SHERWOOD, C. J., absent.

REVERSED

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HALL, Plaintiff in Error v. CALLAHAN et al.

1. **Fraudulent Conveyance**, NOT IMPEACHABLE BY WHOM. A purchaser at administrator's sale cannot impeach a deed made by the administrator's intestate, on the ground that it was made with intent to defraud the creditors of the intestate.
2. **Husband and Wife**: ESTOPPEL. Acts of a husband in respect of the lands of his wife not held as her separate estate, cannot operate an estoppel upon her.
3. **Attorney and Client**. An attorney at law employed to attend to any and all cases that may arise affecting or designed to affect the title of his client to certain lands, is not thereby authorized to assist in procuring from the probate court an order that the lands be sold by the administrator of the former owner, as the prop-



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erty of his intestate, even though this is done with a view of giving his client an opportunity to perfect his title by buying at such sale.

*Appeal from Jackson Circuit Court.*—HON. SAMUEL L. SAWYER, Judge.

In July, 1868, one Samuel W. Nutter, being then largely indebted to several parties, for an expressed consideration of \$17,000, conveyed all his property, personal and real, including a tract of six hundred acres of land, to his sister, Lizzie A. Nutter, who afterwards intermarried with James M. Callahan. The deed was recorded about the day of its date. Several of Nutter's creditors brought suit against him by attachment, claiming that this conveyance was without consideration and fraudulent.

In October, 1868, Nutter departed this life, and one Chapman was appointed his administrator. The attachment suits were revived and proceeded to final judgments in favor of the respective plaintiffs. Nutter had been executor of his father's estate, and his said sister was one of the sureties on his bond. Suit was brought on this bond by the administrator *de bonis non* of Nutter, the elder, and resulted in a judgment for \$2,000 against Chapman, as administrator, and Mrs. Callahan as surety. This judgment was a lien on the real estate of the latter. Suits were also brought against Mrs. Callahan by the widow and child of Nutter, attacking his deed to her. There being no personal assets, Chapman obtained an order from the probate court for the sale of the real estate which had belonged to his intestate, for the purpose of paying his debts. Under this order he offered for sale, at public outcry, the lands which had been conveyed by the intestate, by the supposed fraudulent deed.

At this sale five forty acre tracts were sold, four of them to one Jordan, and the fifth to plaintiff Hall. The proceeds of the sales, amounting to over \$6,000, were used by the administrator in paying off the above mentioned judgments. and the other debts of the intestate.

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Immediately after the administrator's sale, Mrs. Callahan, by a quit-claim deed, conveyed to Jordan, who was a nephew of her husband, all the lands she had acquired from her brother, including in the conveyance the forty acre tract purchased by plaintiff. The present suit was brought against Mrs. Callahan and her husband, and Jordan, to have this conveyance set aside as fraudulent, and to have the title to said forty acre tract declared to be vested in plaintiff, the plaintiff claiming that he had purchased said tract by the inducement, persuasion and encouragement of Mrs. Callahan and her husband, aided and abetted by and with the connivance and assent of Jordan.

The petition charged that the conveyance from Nutter to Mrs. Callahan was voluntary, and that she believed it was void as against his creditors; that her object in having a portion of the lands sold was to get them paid off, so as to secure her title to the remainder against attack, and also to relieve her own lands from the lien of the \$2,000 judgment in favor of the administrator of the elder Nutter.

At the trial evidence was given on the part of the plaintiff tending to show that Chapman, being advised that he could not, as administrator, impeach the conveyance to Mrs. Callahan, took no step to carry out the order of sale made by the probate court, until requested and advised so to do by Tilton Davis, an attorney-at-law, which request was made in the presence of and was acquiesced in by James M. Callahan; that said Davis had been employed by Mrs. Callahan to attend on her behalf to certain actions at law which were named in a written agreement, viz: the cases of *Megede v. Callahan*; *Sallie M. Nutter v. E. A. Nutter et al.*; *The State v. Warner*; *Wentworth v. Chapman et al.*, and *Sallie W. Nutter v. Callahan*, and also "to any and all cases that may hereafter arise affecting or designed to affect the title of said Eliza A. Nutter in and to the lands heretofore conveyed to her by her brother, S. W. Nutter, by deed dated in July, 1868;" that

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Mrs. Callahan had actual notice of the administrator's sale before it took place, and Davis was present at it; that Jordan and Callahan were also present, and seemed to be acting together; that Jordan consulted with the Callahans about the sale beforehand; that the lands purchased in his name were paid for with Mrs. Callahan's money; that Jordan and Callahan both bid on the tract bought by the plaintiff, and ran it up to a high price; that plaintiff, in making his purchase, acted on the faith of the countenance given by Davis and James M. Callahan to the action of the administrator; that Callahan wrote the certificate of purchase given by the administrator to plaintiff; that before her marriage Mrs. Callahan had expressed to the administrator a willingness that some of the lands she had gotten from her brother should be sold to pay his debts; that Callahan had made the subsequent sale of the whole property to Jordan, with his wife's consent, and that he had made other contracts for her with her consent.

Testimony was given on part of the defendants tending to show that Mrs. Callahan did not know of the administrator's sale till after it had taken place, and never assented to it; that neither Davis nor her husband was authorized to represent her at the sale, and that they did not undertake to represent her; also, testimony tending to rebut the charge of a fraudulent combination between Jordan and the Callahans, and to show that plaintiff knew, when he made his purchase, that Mrs. Callahan was in possession, had a deed to the land, and claimed to own it. There was judgment for defendants, and plaintiff appealed.

*H. C. Wallace* for plaintiff in error.

1. Chapman, as administrator of Nutter, was fully authorized to sell. This case is totally different from *McLaughlin v. McLaughlin's, Admr.*, 16 Mo. 242; *Brown's, Admr. v. Finley*, 18 Mo. 375, and *George v. Williamson*, 26 Mo. 192. There had been no attachment in either of those cases, in

the life-time of the fraudulent grantor, as in this case. The judgments in the attachment suits in this case bound and were liens on the lands of the intestate. 1 Wag. Stat. 190, §§ 43, 45; *Ib.* pp. 94, 95, §§ 10 to 15; *Ib.* pp. 97, 98, §§ 28 to 35; *Lackey v. Seibert*, 23 Mo. 85, at page 92; *Ensworth v. King*, 50 Mo. 477; *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183; *Porter v. Schofield*, 55 Mo. 57; *Johnson v. Gage*, 57 Mo. 165. The judgments being declared liens by a court of competent jurisdiction, it was the duty of the administrator to sell the lands without regard to the question as to what title would pass by the sale. *Magrew v. Foster*, 54 Mo. 258.

2. It was not necessary, in order that she be estopped thereby, that Mrs. Callahan should have been present, in person, at the sale; and even if she did not have actual notice of the intention of the administrator to sell, or of the order of the probate court for such sale, or of the sale itself, and the objects and purposes thereof, (which, however, we submit, the evidence taken, altogether, shows that she did have); yet, knowledge and notice to her attorney, Tilton Davis, was in law, knowledge and notice to her, as she is bound by the acts of her attorney in regard to such sale. The employment of Davis, as her attorney, was not merely for his services and attention to certain causes mentioned in their written contract—some of which affected her title to the lands conveyed to her by her brother—but was general in regard to all cases that might arise affecting or designed to affect her title. The proceedings in the probate court of Lafayette county, by Chapman, to obtain an order of said court for the sale of said lands, as well as the sale itself, and the report and approval thereof by said court, was evidently within the meaning of said written contract, "a case," designed to affect the title of said Lizzie A. Callahan, in and to said lands, and hence, was a case which said Davis, as attorney, was engaged and employed to attend to for her. *Sugden on Vendors*, (1 Am. Ed.,) pp. 492, 493; *Ib.*, (9 Ed.,) p. 262; 1 Story Eq. Jur.,

§ 408; 1 Greenlf. Ev., §§ 113, 416; Story on Agency, §§ 126, 129, 256; Angell & Ames on Corp., § 305; *Griffith v. Griffith*, Hoffman Ch'y. 153, at pp. 158-9, and notes; *Griffith v. Griffith*, 9 Paige 315; *Westervelt v. Haff*, 2 Sandford's Ch'y. 98, 107. A husband may be the agent of his wife. Story on Agency, §§ 6, 7; *Brady v. Bragg*, 1 Head (Tenn.) 511.

3. The gist and gravamen of plaintiff's suit, and cause of action, is the encouragement and acquiescense given by Lizzie A. Callahan and her husband, in person, and by the husband and agent, and the attorney of said Lizzie A. Callahan, to plaintiff to purchase the land (40 acres) in controversy, at the public sale thereof, by Chapman, the administrator, and the fraud practiced on plaintiff in such purchase, by defendants, in which fraud defendant Jordan, who held a quit-claim deed for said land, at the commencement of said suit, from said other defendants, largely and actively participated. See *Huntsucker v. Black*, 12 Mo. 333; *Taylor v. Zepp*, 14 Mo. 482.

4. That defendants, and each of them, on the general principles of the doctrine of equitable estoppel, would be precluded from claiming or asserting title to the land in controversy in this case, as against plaintiff, there can be no question. 1 Story's Eq., § 385; *Ib.*, § 387; *Ib.*, 376; *Wendell v. Van Rensselaer*, 1 John. Chy. 354; *Storrs v. Barker*, 6 John. Chy. 166; *Newman v. Hook*, 37 Mo. 207; *Lindell v. McLaughlin*, 30 Mo. 28; *Highley v. Barron*, 49 Mo. 103; 3 Wash. Real Property, (10 Ed.) pp. 76, 77, 78, 79, 80, 106, 107; *Rice v. Bunce*, 49 Mo. 231; *Tutt v. Boyer*, 51 Mo. 425; *Garnhart v. Finney*, 40 Mo. 449; *Barham v. Turbeville*, 1 Swan 437; *Beaupland v. McKeen*, 28 Penn. St. 124; *Shaw v. Beebe*, 35 Vt. 205; *Blackwood v. Jones*, 4 Jones Eq. 56; *Hayes v. Livingston*, 3 Cent. Law Journal 691; S. C., 34 Mich. 384; *Turner v. Baker*, 64 Mo. 218; *Mills v. Graves*, 38 Ill. 455; *Snodgrass v. Ricketts*, 13 Cal. 359; *Hatch v. Kimball*, 16 Me. 146; *Durham v. Alden*, 20 Me. 228; *Swick v. Sears*, 1 Hill 17; *Copeland v. Copeland*, 28 Me. 525; *McCune v. McMichael*, 29 Geo. 312; *Brown v.*



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*Wheeler*, 17 Conn. 345; *Valle v. Fleming*, 29 Mo. 152; *Valle v. Bryan*, 19 Mo. 423; *Wolf v. Robinson*, 20 Mo. 459.

5. So a party may be estopped by the acts and declarations of his agent, as well as by the acts of a party standing in some relation of privity with him. *Chouteau v. Goddin*, 39 Mo. 229.

Defendant, James M., was the husband of Lizzie A. Callahan, at the time of and before said administrator's sale, and the law, in the absence of any other legally constituted agent or trustee, regards the husband as the agent of the wife. *Hamilton v. Bishop*, 8 Yerger 33. This agency grows out of the very relation of man and wife. Besides, the evidence of both Mrs. Callahan and her husband shows that he acted as her agent with her consent and knowledge, in managing her business.

*Walker & Field* for defendant in error.

I. The probate court of Lafayette county had no jurisdiction or authority over the lands of Samuel W. Nutter, deceased, that he, during his life, had conveyed to his sister, Lizzie A. Nutter; that deed is valid till set aside by creditors in the manner provided by law. *George v. Williamson*, 26 Mo. 190; *Brown's Admr. v. Finley*, 18 Mo. 375; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Perry v. Calvert*, 22 Mo. 361; *Johnson v. Jeffries*, 30 Mo. 423; *Reid v. Mullins*, 48 Mo. 344; Bump on Fraud. Convey., p. 444, note 2. The right of executors and administrators to impeach a conveyance, when the estate is insolvent, is expressly conferred by statute in the States of Massachusetts, Vermont, New Jersey, North Carolina, Wisconsin, Michigan, Ohio, Indiana, Louisiana, New York and Texas, and decisions from any of those States, quoted on this point, would not be authority in Missouri, for the reason that we have no such statute in this State.

II. A wife cannot part with her legal estate, except by deed, in which her husband joins, duly acknowledged

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in conformity with the statute. 1. Wag. Stat., §§ 2, 3, Ch. 35, Art. 1; 2 Wag. Stat. 935, § 14; *Huff v. Price*, 50 Mo. 228; *Wannall v. Kem*, 51 Mo. 151; *Clark v. Rynex*, 53 Mo. 380; *Chauvain v. Wagner*, 18 Mo. 532; *Reaume v. Chambers*, 22 Mo. 36; *Hempstead v. Easten*, 33 Mo. 142; *Shroyer v. Nickell*, 55 Mo. 264.

III. Lizzie A. Callahan is not estopped, by reason of her husband, James M. Callahan, having been present at the sale, and having bid on the land in controversy; nor have any acts been proved that would operate as an estoppel to her. He was not the express or implied agent of his wife, and his acts could not prejudice her rights; nor were Davis or Chapman her agents, nor could she be estopped by their acts. A married woman cannot appoint an agent. Story on Agency, (4 Ed.,) p. 8; Dunlap's Paley on Agency, (4 Am. Ed.,) p. 1. If Davis and Chapman were her agents, that agency was revoked by her subsequent marriage with James M. Callahan. Dunlap's Paley on Agency, (4 Am. Ed.,) p. 189, note 7. James M. Callahan was not the agent of his wife. To establish the agency of the husband on behalf of the wife, the evidence must be cogent and strong, and more satisfactory than would be required between persons occupying different positions. *Eystra v. Capelle*, 61 Mo. 578. The doctrine of estoppel cannot be invoked in this case, for the reason that estoppel *in pais*, in regard to legal estate, has no application to married women. Bigelow on Estoppel, (Ed. 1872,) pp. 485-6, and cases there cited; *Glidden v. Strupler*, 52 Penn. St. 400; *Morrison v. Wilson*, 13 Cal. 494; *Rangely v. Spring*, 21 Me. 130; *Bank U. S. v. Lee*, 13 Peters 107; *Bemis v. Call*, 10 Allen 512.

HENRY, J.—That a conveyance in fraud of creditors cannot be impeached by the grantor, or his administrator, is well settled in the State by the cases of *McLaughlin v. McLaughlin*, 16 Mo. 242, *Brown's Admr. v. Finley*, 18 Mo. 375, and *George v. Williamson*, 26 Mo. 190. The probate court of Lafayette county therefore, had no jurisdiction

over the lands conveyed by said Nutter to his sister Lizzie A. Nutter, and the plaintiff acquired no title by his purchase of the land in controversy from the administrator: cases above cited.

Whether the doctrine of estoppel *in pais* applies to a married woman, as to land owned by her, but not as her separate property, it is wholly unnecessary to determine in this cause, because we do not think that the allegations in the petition of matters of estoppel were sustained by the evidence. There was no evidence except that of the relation between her and her husband, tending to show that she authorized or was informed of, the conduct of her husband in regard to the sale of the land. None whatever, that in person, she urged or sanctioned the sale by the administrator, while she testified positively that she did not know that the application for an order to sell the land had been made to the probate court, or that the application was granted, until after the sale had taken place, and that her husband was not her agent.

The land was not her separate estate, and this court held in *Wilcox et al. v. Todd*, 64 Mo. 390, that as to the other property owned by her she could have no agent.

Her husband testified that he did not inform her of the proceeding in the probate court, or of the order of sale. He also testified that he had no authority from her to procure a sale by the administrator, or to bid or procure bidders at the sale.

There is evidence tending to show that Tilton Davis, her attorney in other cases, advised Sam'l Callahan's administrator to procure an order for the sale of the lands, under the impression that a purchase by her at such sale would perfect her title, but he testified that he gave no such advice, nor expressed such an opinion. Whether he did or not, it would not have been binding upon Mrs. Callahan. It was not within the scope of his employment as her attorney. He was employed as an attorney at law to attend to certain cases therein specified, and generally to

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attend "to any and all cases that may hereafter arise affecting, or designing to affect the title of said Lizzie A. Nutter in and to the lands heretofore conveyed to her by her brother, Sam'l W. Nutter." This certainly did not authorize him to procure the assertion of a hostile claim, and the sale of her lands under an order of the probate court. From the fact that he never consulted Mrs. Callahan in relation to, or advised her of, the proceeding in the probate court, or of the order made by that court, it is likely, as Davis states, that the witnesses misunderstood him. If for her benefit he advised that proceeding, it is very strange that he did not, as her attorney, inform her that the order had been made, and that she should prepare to purchase the land at the sale.

The court below committed no error in the trial of the cause, and with the concurrence of the other judges, its judgment is affirmed.

AFFIRMED.

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HUGHES V. HANNIBAL & ST. JO. R. R. Co., *Appellant*.

1. **Railroad: NON-LIABILITY FOR CATTLE DROWNED ON COMPANY'S LAND.** The forty-third section of the Railroad Law, (Wag. Stat., p. 310, § 43,) imposes upon a railroad company no liability to the owner of cattle accidentally drowned in an unenclosed well situated on the company's right of way, notwithstanding the loss is occasioned by the failure of the company to erect and maintain proper fences as required by that section.
2. **Unenclosed Lands: PROPRIETOR NOT LIABLE FOR ACCIDENTAL INJURY TO CATTLE COMING UPON THEM.** The proprietor of unenclosed land is under no obligation to make it safe for pasturage, and if the cattle of another stray upon it and are killed by drowning in an unguarded well, there is no liability resting upon him for the loss. A railroad company stands upon the same footing as any other proprietor,

*Appeal from Macon Court of Common Pleas.*—HON. WILLIAM A. GUYSELMAN, Judge.

*James Carr and H. B. Leach* for appellant.

*J. L. Berry* for respondent.

HOUGH, J.—This was an action to recover the value of a heifer accidentally drowned in an abandoned tank or well, situated in the open prairie in Macon county, upon the line of defendant's right of way, four feet eight inches of its diameter being on the defendant's land, and four feet thereof, on the land of the adjacent proprietor.

The plaintiff bases his right to recover upon the alleged negligence of defendant in failing to enclose or cover said well. No statutory liability is imposed upon the defendant for injuries like the one complained of, although occasioned by its failure to erect and maintain fences as required by the 43rd section of the law in relation to railroad companies. The liability of the defendant is therefore, such only as is imposed by the common law. *Lafferty v. Han. & St. Jo. R. R.*, 44 Mo. 291; *Ill. Cent. R. R. Co. v. Carraher*, 47 Ill. 333.

Who made the excavation does not appear. It was used by the defendant for the purpose of a tank or watering place until a tank was erected at another place near by, when the well was abandoned and left uncovered and unenclosed. To divest the case of all embarrassing incidents, so far as the plaintiff is concerned, we will suppose the excavation to have been made by the defendant, wholly upon its own lands. So far as the present inquiry is concerned, the railroad company stands upon precisely the same footing as other land owners, and only those acts required of natural persons, under like circumstances, can be required of the defendant.

In this State, and in others similarly situated, it has



been held that the owner of cattle may permit them to run at large and stray upon the unenclosed lands of others without incurring any liability for such technical trespass, but it has never been held that the owners of the unenclosed lands are required to make them safe for the pasturage of such stray cattle. The existence of any such duty, on the contrary, is distinctly denied. *Ill. Cen. R. R. Co. v. Carraher*, 47 Ill. 333. The law on this subject is so perspicuously and succinctly stated by Chief Justice Gibson, in the case of *Knight v. Abert*, 6 Penn. St. 472, that we transcribe and adopt his views as applicable to and decisive of the present case. In that case the defendant was the owner of unenclosed woodlands, in which he had dug an ore pit. The plaintiff's ox had wandered on the land and fallen into the pit, and was thereby killed. For this the action was brought.

Gibson, C. J.: "In this, and perhaps in every American State, an owner of cattle is not liable to an action for their browsing on their neighbor's unenclosed woodland. But it follows not because such browsing is excusable as a trespass, it is matter of right. It is an immunity, not a privilege, or at most a license revocable at the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law, probably on the foot of the maxim, *de minimis*, or perhaps, because it is better that all waste lands should be treated as common without stint. It certainly saves vexatious litigation. The particular loss from it is inappreciable, even as a subject of nominal damages, and would probably be held so even in England, where waste land is altogether worthless. But even if an owner of cattle had the right claimed for him, the tenant would not be bound to expend his money or his labor in preparing his land for the safe and convenient enjoyment of it. A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not interfere with it, or enter upon it.

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He who suffers his cattle to go at large, takes upon himself the risks incident to it. If it were not so, a proprietor could not sink a well or a saw pit, dig a ditch or a mill race, or open a stone quarry or a mine-hole on his own land, except at the risk of being made liable for consequential damage from it, which would be a most unreasonable restriction of his enjoyment. He might as well be required to level a precipice, put a fence round a swamp or cut down reclining trees. It is enough in all reason, that his neighbor's cattle have the range of his forest, without imposing on him the duty of looking to their safety. If the owner of them do not choose to enjoy his license on that footing, let him keep them at home, or send a herdsman along with them. The law imposes no such duty on the tenant."

The cases relating to excavations made so near a public way as to be dangerous, under ordinary circumstances, to persons passing upon the way, are inapplicable to the case at bar and need not be noticed.

The judgment of the common pleas court will be reversed. The other judges concur.

REVERSED.

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THE STATE *ex rel.* THE ATTORNEY GENERAL *v.* MILLER *et al.*,  
*Appellants.*

1. **Contracts of Public Corporations:** RATIFICATION OF, BY STATE. The General Assembly, by an act passed in December, 1855, enacted, "that all contracts made by the trustees of the town of New Franklin, for the purpose of raising the amount authorized in the act of incorporation, be, and the same are hereby declared to be legal, and may be carried out according to the true intent and meaning of the parties thereto." At the time of the passage of this act, but two contracts had been made by the trustees, one in 1842, the other in 1849; and long prior to its passage, the contract of 1842 had been declared valid by the judgment of this court; *Held*, that the State,

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by the act, intended to remove doubts as to the validity of the contract made by the trustees in 1849, and thereby ratified the same; and that a subsequent ratification by the State of a contract made by one of its own agencies is equivalent to a previous authorization.

2. ———: ———: VESTED RIGHTS UNDER. Public corporations are the auxiliaries of the State in municipal government, and neither their existence nor their privileges, rest upon anything like a contract between them and the legislature; but, when such a corporation, by authority of the State, contracts with a third person, whereby rights become vested in such person, they cannot be divested by the State; such a contract becomes, *pro hac vice*, the contract of the State, and if imperfectly made, can be validated by it, and, when so validated, cannot be violated by the State.
3. ———: MODIFICATION OF, WHEN VALIDATED BY LEGISLATIVE ACT: SUCH ACT NOT OBNOXIOUS AS A RETROSPECTIVE LAW. The act of 1855 is not obnoxious to the constitutional objection that it is retrospective in its operations; the State, as one of the contracting parties, had the same right to consent to the modification of the contract made in 1849, as it had to confer original authority on the town of New Franklin through its trustees to enter into the contract of 1842.
4. ———: VESTED RIGHTS UNDER: WHEN THEY CANNOT BE DIVESTED BY QUO WARRANTO. When the State, through the agency of a public corporation, makes a contract with a third person, and such contract imposes no obligation upon such person to look to the application of the money to be paid by him under such contract, it cannot, by a proceeding by *quo warranto* forfeit and take away the right of the assignees of such person, because such corporation does not apply the funds realized to the object for which they were intended.

*Appeal from St. Louis Court of Appeals.*

*James O. Broadhead*, for appellant.

1. The creation of the town of New Franklin was the creation of a public corporation, called the town of New Franklin, but the Legislature authorized the town of New Franklin (which was an agency of the State) to make a contract with an individual, and so soon as that contract is made, there is a franchise, which the State, through its agent, has made, and which it cannot interfere with. I say that the Legislature can abolish the town of New Franklin to-day if it sees fit. It could have done it twenty years ago. It could have blotted it out of existence as a corpo-

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ration or municipality if it had chosen at any time, either with or without cause. It needed no cause whatever to blot out of existence the town of New Franklin, except that the Legislature should declare that the public good required it; but if the State has used the town of New Franklin as an agent by which a contract has been made with certain individuals in this State, that is a contract made by the State, which no power in this land can interfere with.

Is it a contract? Our Supreme Court has so held and I call your honor's attention to the fact that they have decided that it is a contract, and an inviolable contract—a contract protected by that provision of the Federal Constitution which says that no law shall be passed impairing the obligation of any contract—a contract which Judge NARTON, in delivering the opinion of the Supreme Court, says the State can no more interfere with than it can interfere with a contract between individuals.

2. The making of the contract does not make the contracting party any part of the corporation of the town of New Franklin. They are authorized to make contracts with him just as a city may be authorized to make a contract with a man in St. Louis county for any purpose whatever; and you might as well say that the person with whom that contract is made is responsible for the act of the corporation of the city of St. Louis, as to say that the man who contracted under this authority of the Legislature to sell lottery tickets to raise money for the town of New Franklin, is responsible for a dereliction of duty on the part of the trustees of that town. It is a most monstrous proposition for the State to advance here in a court of justice.

3. If we should admit that the contract of 1849 was in violation of the law, as it stood at that time, is there any doubt about the power of the Legislature to pass the act of 1855, declaring valid all contracts made prior to that date?

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*Barton County v. Walser*, 47 Mo. 189; *Steines v. Franklin County*, 48 Mo. 167.

4. It is claimed by the Attorney-General that the passage of this act was the exercise of judicial power on the part of the Legislature, but this would be equivalent to saying that the State cannot, through the Legislature, make a contract. He may as well say that an act of the Legislature providing for leasing the penitentiary or modifying the lease is a judicial act; the true and well settled doctrine on this subject is that the Legislature cannot pass a law determining the rights between individuals, but so far as the State is concerned it may make or modify its own contracts with individuals, and this contract of 1849 was a modification of the contract of 1842 between the State and Gregory, made by the State's own agents and confirmed by the act of 1855.

Now, there is really the gist of this whole case. The gentlemen have confounded the two ideas. They have undertaken to establish this proposition, that Gregory is mixed up with the franchise, that Gregory and the trustees are one, that this is a grant to Gregory and the trustees. Why, that is not so. The State simply authorizes these trustees, as its own agent, to make a contract, and through its agents it has made this contract. The State has made it, the Legislature has made it, and they can no more impair a contract made by themselves than they can pass a law impairing a contract between individuals. *Gelpcke v. Dubuque*, 1 Wall. 175.

5. This court has decided, time and again, that a law passed, and in force on the adoption of the constitution, although that law, in its spirit and essence, is in violation of some new provision adopted by the New Constitution, nevertheless the Legislature afterwards may amend that law, extend its powers and give it new force and efficacy, in spite of the inhibitions of the constitution. *State ex rel. v. Cape Girardeau, &c.*, 48 Mo. 471.

6. There is all the difference in the world between a



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private and a public corporation. The grant of a charter to a private corporation was held in the Dartmouth College case, and has always been so held since, as a contract which could not be violated, a contract made between a Legislature which grants a charter and the person who is to enjoy its benefits. But a county or town is not an independent, individual person having right of property, with which the State cannot meddle, but is a mere local agency employed by the State for the purpose of municipal government, and liable to have its very existence determined and ended, if the State shall so order. *Hamilton v. St. Louis County*, 15 Mo. 3; *Barton County v. Walser*, 47 Mo. 189; *People v. Power*, 25 Ill. 190; *East Hartford v. Hartford Bridge Co.*, 10 Howard 533; *Dunklin Co. v. District Court*, 23 Mo. 449; *Reardon v. St. Louis County*, 36 Mo. 555; *Han. & St. Jo. R. R. Co. v. Marion County*, 36 Mo. 294.

*D. T. Jewett and A. W. Mead* for appellant.

1. It has been repeatedly decided by this court that this is a contract simply. *State v. Hawthorn*, 9 Mo. 389; *Morrow v. State*, 12 Mo. 279; *State v. Morrow*, 26 Mo. 131; *State v. Miller*, 50 Mo. 129.

2. But suppose it is a franchise? Then it is an independent one. It has no connection with the spending of the money. The 10th section of the act of 1833 is set forth in the information, as authorizing the Legislature to repeal all the powers granted by that act. That is of no importance. The Legislature could, without that section, at any time have lawfully repealed all the powers granted by the act of 1833, as that was a mere municipal franchise or charter, and there was no contract in it. But after the act of 1835, and a contract had been made under it, then it was, and is, past the power of the Legislature or convention to annul that contract, as the Supreme Court of this State has four times decided. Some of the judges below could not seem to see any distinction between a municipal charter or franchise, that could be repealed, and a contract

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made by authority of the State that could not be annulled or repealed. The Gregory agreement is a contract, and cannot be engrafted upon the municipal franchise so as to become repealable at the pleasure of the Legislature, but stands independently, and cannot be broken by one party to it against the will of the other.

But the charter granted to the town of New Franklin is a municipal charter, so far as the town is concerned—as many other privileges are granted to that town by the act of 1833 besides the power to raise money by a lottery.

If the contract can be destroyed by the failure of the trustees to run the municipal franchise right, then *e converso*, the franchise can be destroyed by failure to fulfill the contract!

But if this Gregory contract is called and treated as a franchise, we say it is an independent one, and can only be forfeited for malfeasance under it, and that it would stand, though the municipal franchise might be taken away or forfeited, or other franchises in the same charter. This is expressly laid down as settled law in Tomlin's Law Dictionary, title *quo warranto*, p. 283, 2d column, and Tancred, *quo warranto*, p. 257.

J. L. Smith, Attorney-General, Frank J. Bowman and C. P. Ellerbe for respondent.

1. It is well settled that it is a tacit condition of a grant of incorporation, that the grantee shall live up to the end or design for which it was granted. 16 Maine 224; *People v. Bank of Niagara*, 6 Cowen 196, 211, 217; 4 Wheat. 558-9; 2 Mo. 169; 5 Mass. 230; 9 Wend. 351; 9 Cranch 43, 51; 2 Mo. 169.

2. Long continued and willful neglect on the part of a corporation to comply with the requirements of its charter, and carry into effect the purposes for which it was created, is cause of forfeiture. 6 Iredell 460, 456; 23 Wend.

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235; 5 Iredell 309; 23 Wend 254, 537; 4 Cushing 60, 62; 20 Penn. 185.

3. A corporation, by the terms and nature of its existence, is subject to surrender, by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and non-user. 8 Peters 281; 11 Alabama 472; 19 Maryland 239; 16 Mass. 102.

4. The plank road franchise was first granted to the trustees of New Franklin, with its lottery attachment, and was afterwards transferred, as is claimed by respondents, to one Gregory and his assigns—under these several assignments defendants now claim. In the original contract with the State, the terms upon which the lottery franchise might be enjoyed, are plainly and unequivocally expressed, viz: To build and keep in repair a plank road, and to use the money raised, for that purpose only. It will be observed that this is the positive provision of the act of 1855, under which title is now claimed. An assignee takes no better or greater title than his assignor possessed—the building of the road was the condition upon which the franchise could alone be enjoyed by the trustees of the town of New Franklin, and they could not convey the franchise divested of its obligations—the obligations have been violated, and the defendants are no longer entitled to enjoy the questionable privileges of this peculiar franchise.

5. When the State grants a franchise for a certain purpose, the purpose contemplated must be strictly complied with, or the parties lose the right to enjoy the privileges of the franchise. *Att'y Gen. v. P. & R. R. Co.*, 6 Iredell 456; *Att'y Gen. v. Washington and B. Turnpike Road*, 19 Md. 239.

6. We insist that the contract of 1842 is utterly null and void, because the act of 1833, only gave the trustees themselves power to draw the lottery, and it was not until the act of 1835 was passed, that they had the power vested in them, to contract for the drawing; and it was not until the contract of 1842 between Gregory and the trustees was

executed, that the trustees of New Franklin exercised their right under the act of 1835, allowing them to contract for the drawing; and in the intervening space of time between the act of 1835 and the contract of 1842, there was a very stringent lottery law passed by the Legislature of 1836, prohibiting lotteries. Then we claim that as the right given the trustees of New Franklin by the act of 1835, to contract as before stated, was not exercised till 1842, the broad and stringent lottery act of 1836 repealed the lottery franchise under the acts of 1833 and 1835, and that the execution of the contract of 1842 being subsequent to the act of 1836, is null and void; that the trustees of New Franklin were not in the same legal condition after the broad and stringent lottery act of 1836 was passed, as they were before it was so passed. See Revised Code 1835, page 398.

7. We further claim, that the pretended contract of 1849, extending the lottery franchise by postponing the time of payment, is void for several reasons:

1st. Because it is a *nudum pactum*, without consideration. The lottery manager, Gregory, was required, by the contract of 1842, to pay \$500 per year in semi-annual payments, and this extension of time, upon the mere payment of \$500, when he should have paid the \$500 regularly from year to year, is no consideration, for it did not confer any additional benefit on the trustees, but was a loss to them, of the various sums that should have been paid during the extension of time, and it was a benefit to Gregory, and there should have been a new consideration offered on the part of Gregory, and accepted, to make valid the contract of 1849.

2nd. It is void, because it refers to a lottery supposed to exist by previous contract, and is also in itself a lottery contract, and the statutes of 1836 and 1842 prohibited all lotteries in this State. Therefore said contract of 1849, having been executed subsequent to the broad, stringent

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lottery Acts of 1836, 1842 and 1845, is null and void. (See Acts of 1836, 1842, and Revised Code, of 1845.)

8. It appears that there was an act passed December 6, 1855, which attempts to legalize the former contracts of 1842 and 1849, between the trustees of Gregory, under whom defendants claim. We insist that it does not, and cannot, because the contract of 1842 being void, as just stated, as also the contract of 1849, by reason of the stringent acts of 1836, 1842 and 1845 prohibiting lotteries, this statute attempts to legalize contracts void and illegal, and infuse life and vigor into them when they were void at the time of their creation, and presumes to legislate upon a subject-matter that has an illegal existence, and we insist that a Legislature cannot legalize a contract originally void; nor make or alter contracts for parties. The act of December 6, 1855, does not validate the contracts, unless it abolishes the prohibitory lottery acts of 1836, 1842 and 1845. It cannot be presumed that the Legislature intended to repeal the act of the 8th of January, 1845, which was a general law and remained in force until the 8th of December, 1855, when the same Legislature passed an act prohibiting all drawing of lotteries and sales of tickets only two days after the supposed legalizing act of December 6, 1855, was passed.

9. Said act of 1855, acts retrospectively, by attempting, in the face of the stringent lottery act of 1842, to go behind and disregard said act, and validate a contract that has an illegal existence, and which was void at the time of its creation, by virtue of said act of 1842. The constitution of 1845 prohibits, in direct terms, the very thing that the Legislature of 1855 has done, to-wit: the passage of laws acting retrospectively. See Constitution of 1845. As before stated, the statute of 1842 is a general statute, and this act of 1855 is simply a ratification of a contract, and is a special act of legislation, and cannot in any manner affect the broad language and meaning of said act of 1842.



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10. The Legislature of 1855 had no power or right to decide what was or what was not legal, that power is vested in the judiciary department only. Cooley Const. Lim., §§ 91, 92; Dwarris on Stat., p. 69, 2d note, p. 365. Upon general principles, the courts can declare an act void and unconstitutional, if it usurps the functions of another department. Cooley Const. Lim., p. 175; 27 Penn. 456; *State ex rel. Pittman v. Adams*, 44 Mo. 572; 5 Gray 100.

11. The act of 1870, by which it is attempted to restore the already forfeited rights of these defendants, and to protect and aid this lottery scheme, by authorizing a macadamized instead of a plank road, was utterly null and void; for by the constitution of 1865, it was provided that "The General Assembly shall never authorize any lottery; nor shall the sale of lottery tickets be allowed; nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein be sold." See article 4, section 28, of the constitution of 1865.

12. The lottery was most positively prohibited by the constitutional provisions of 1865, before stated, and the constitutional prohibition of 1875, which in clear and distinct language says. "The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, in any scheme in the nature of a lottery in this State; and all act or parts of acts, heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto are hereby avoided." See section 10, of article 14, Constitution of 1875. The rights of defendants should be strictly construed, as the privileges claimed by them are in direct violation of the Constitution of the State and the laws against gambling; public policy requires the suppression of so monstrous an evil, and has made it necessary that this grand speculative scheme, which seeks, in defiance of the moral sense of the community, to maintain itself in our midst, should be suppressed; and the able

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jurists composing the Constitutional Convention whose work has been ratified with such remarkable unanimity, determined to cut up by the roots this growing evil, by declaring that all laws in any manner sanctioning it should be avoided, the State thus assuming the responsibility for all damage, if damage there be. This provision was necessary as a proper police regulation for the State—public policy demanded it—the people in their sovereign capacity had the right to so declare, and have exercised that right.

NORTON, J.—This is a proceeding in the nature of *quo warranto* exhibited by the Attorney-General on behalf of the State, to the St. Louis circuit court; in which it is alleged that defendants, without warrant, and in violation of law were engaged in selling lottery tickets under a pretended franchise, and praying that they be required to appear and show by what authority they were acting.

Defendants appeared and alleged in their answer that by virtue of a contract entered into on the 1st of June, 1842, by one Gregory with the trustees of the town of New Franklin, and a modification thereof made on the 11th of April, 1849, as ratified by an act of the General Assembly, passed in December, 1855, they were fully authorized to enjoy the privilege of selling tickets and conducting a lottery in the State till the year 1877, they having acquired by purchase and assignment from the representatives of said Gregory all the rights accruing to him under said contracts. It was also averred that the General Assembly passed an act in 1833, incorporating the town of New Franklin, in which it was provided that it might, through its trustees, raise by lottery the sum of \$15,000, for the purpose of building a railroad from said town to the Missouri river; that in 1835 another act was passed authorizing the said trustees to contract with any person to have said lottery drawn, in any part of the United States, on such terms as they might consider the most advantageous; also another act,

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passed in 1839, whereby the trustees were empowered to apply the proceeds of said lottery in constructing a macadamized, instead of a railroad; that it was also provided by this act that the Governor might, by proclamation, authorize the trustees to raise by lottery a sum not exceeding \$15,000 to complete the work; that under a proclamation thereafter issued by the Governor, giving the requisite authority, the said trustees, on the 1st of June, 1842, made a contract with one Walter Gregory, by which they sold and transferred to him the said lottery privilege and all right to control the same, and appointed him the sole manager thereof, in consideration of which the said Gregory agreed to assume the management of said lottery and to pay the trustees, in installments, \$250 on the first day of January, 1843, \$250 on the first day of June, 1843, and so on, paying the sum of \$250 semi-annually till the said sum of \$15,000 was fully paid; that the said Gregory further agreed to pay all expenses, costs and charges growing out of the management of said lottery, to sustain all hazards, risks and losses, and pay all prizes drawn or decided in said lottery; that this contract was modified by another made on the 11th of April, 1849, between said Gregory and the board of trustees, whereby the said Gregory, on the payment of \$500, was released from all payments under the contract of June 1, 1842, till the 15th of June, 1851, when the semi-annual payments of \$250 on the said contract were then to begin and continue until the additional sum of \$13,400 was fully paid; that the General Assembly, by an act passed in December, 1855, (Sess. Acts 1855, p. 467,) among other things, provided "that all contracts made by the said trustees for the purpose of raising the amount of money authorized to be raised by the said act of incorporation, and the acts amendatory thereof, for the purpose of constructing a rail or macadamized road from the bank of the river to said town, be, and the same are hereby declared to be legal, and may be carried out ac-

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cording to the true intent and meaning of the parties thereto."

Upon a trial in the circuit court, judgment of ouster was rendered against the defendants, which, on appeal to the St. Louis Court of Appeals, was affirmed, from which defendants have appealed to this court.

It is contended by respondents that the judgment is rightful :

1st. Because there was not in being any valid contract conferring upon defendants the right to conduct a lottery.

2nd. Because the privilege of conducting a lottery conferred by the act of 1833 had been forfeited by misuser and a misapplication by the trustees of the town of New Franklin of the moneys derived from it.

Anterior to the adoption of the constitution of 1865, there was nothing in the organic law prohibiting the Legislature from establishing lotteries. Until then, they had the right to pass laws authorizing or forbidding the sale of lottery tickets. Under the constitution of 1820, the General Assembly had the power to authorize the town of New Franklin, through its trustees, to raise money by means of a lottery, and this we understand to be conceded. Nor is it denied that the act of 1835, empowering the said trustees to contract with any other person for the drawing and management of the lottery was a legitimate exercise of legislative power; nor is the validity of the contract entered into by the trustees with Gregory in June, 1842, questioned, its binding force having been sanctioned by this court heretofore in the cases of *Morrow v. State*, 12 Mo. 279; *State v. Morrow*, 26 Mo. 131, and *State v. Hawthorn*, 9 Mo. 389. It is, however, claimed by respondent that under the contract of 1842, the defendants, as assignees of Gregory, had no right to operate a lottery after the year 1870, as at that time the whole sum of \$15,000 authorized by this means would have been realized. It is insisted on the other hand by the defendants that the contract of 1842

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was so modified by the contract of 1849 as to continue the time for conducting the lottery till the year 1877, and that if the contract of 1849 was tainted with any infirmity it was cured by the confirmatory and validating act of December, 1855.

The question then presents itself, Were the defendants engaged in selling lottery tickets under any valid contract made with the State or its agencies, when this proceeding was instituted? It is not an open question that, under the contract of 1842, the defendants, as the assignees of Gregory, could rightfully manage and carry on a lottery till 1870. The cases above cited put this question to rest. Was the contract of 1842 so modified by the contract of 1849 as to continue this right till 1877? It is insisted by respondent that the contract of 1849 had no such effect, because it extended the time for conducting the lottery from five to seven years, in violation of the acts of 1842 and 1845, which prohibited the sale of lottery tickets in the State, and was therefore void. This argument, if sound, would prove that the contract of 1842 was also void, because the Legislature in 1836 passed an act prohibiting the sale of lottery tickets, which was in full force when the contract of 1842 was entered into. This court pronounced that contract valid, notwithstanding the existence of the act of 1836. We are not to presume that the court overlooked that act when the validity of that contract was the direct question before them in two cases.

It is also said that the contract of 1849 is void because it is not supported by any consideration. Whether this be so or not can make no difference, if, by the act of 1855, it was validated—ratified by the State speaking through the General Assembly.

1. CONTRACTS OF  
PUBLIC CORPORATIONS:  
ratification  
of, by State.

It is declared in the acts of 1855, p. 467, "that all contracts made by the trustees of the town of New Franklin for the purpose of raising the amount authorized in the act of incorporation \* \* \* be, and the same are hereby declared to be legal and may be carried out according



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to the true intent and meaning of the parties thereto." The words of this act are unambiguous. At the time of its passage but two contracts had been made by the trustees—one in 1842, the other in 1849. Besides these no others were in existence to which the language of the act could be applied. The Legislature could not have referred alone to the contract of 1842, because they used the word "contracts," which embraced not only that but all others. The contract of 1842 needed no legislative ratification to support it, because long prior thereto it had been upheld by the judgment of this court. The contract of 1849 had not at that time undergone judicial scrutiny, nor had its legality been passed upon—and the presumption is that the General Assembly, because of the existence of doubts as to its validity, intended to remove them and make that clear which before was questionable. We are unacquainted with any principle of construction which would justify us in applying the act of 1855 to the contract of 1842, which needed no aid or support, to the exclusion of that of 1849, which, the argument of respondent tends to show, did require confirmation to give it force and effect. Both are embraced in the terms of the act, and we cannot do violence to it by giving to the words it contains a more restricted meaning than they import. It is settled that a subsequent ratification by the State of a contract made by one of its own agencies is equivalent to a previous authorization. (*Steines v. Franklin Co., supra.*)

The contract of 1849 was so made because by the act of 1833 the town of New Franklin became a public as con-

2. —: —: tradistinguished from a private corporation ;  
vested rights under. and such public corporations are called into being at the pleasure of the State, and neither the charter nor act of incorporation is in any sense a contract between the State and the corporation. The same voice which speaks them into existence may speak them out. (2 Dill. Mu. Cor., Sec. 30.) Such corporations are the auxiliaries of the government in the important business of municipal

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rule and cannot have the least pretension to sustain their privilege or their existence upon anything like a contract between them and the Legislature. (Ang. and Ames Cor. Sec. 31.) When the State, however, does create such agency, and through it contracts with a third person, whereby rights become vested in such person, it is then beyond its power to divest them; for, such contract is *pro hac vice* the contract of the State, the obligation of which, it cannot impair without trampling under foot that provision of the constitution, which declares that no State shall pass any law impairing the obligation of a contract; and, if such agency make a contract with a third person touching a subject in reference to which the State has authorized it to contract, and such contract is imperfectly made, it is within the power of the State to validate it.

If, therefore, the contract of 1849 was not, as is contended, in conformity to law, the act of 1855 declared it to be legal, and that it should be carried out "according to the intent and meaning of the parties thereto."

If the General Assembly in the act of 1855, instead of referring in general terms to all contracts made by the trustees of the town of New Franklin, had incorporated in the act the contracts of 1842 and 1849, in the very words in which they were expressed, they would not have been rendered more valid than they are under the act which includes both of them by the reference therein contained. Both stand upon the same footing and are to be regarded as the contracts of the State, which it, no more than an individual, can violate.

It is also urged that the act of 1855 is obnoxious to that provision of the constitution which declares that the Legislature shall not pass any law retrospective in its operation. The cases to which we have been cited in support of this view are cases in which the Legislature undertook to make acts valid between individuals which were void in their inception, as, for instance, that a deed executed by A

3. —: modification of, when validated by legislative act: such act not obnoxious as a retrospective law.

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to B, though void when made, should be held valid; or that a deed made by an insane person should be legal and binding. The principle decided in such cases has no application here, for the reason that the State, as one of the contracting parties, had the same right to consent to the modification of the contract made in 1849, as it had to confer original authority on the town of New Franklin, through its trustees, to enter into the contract of 1842. (*H. & St. Jo. R. R. Co. v. Marion Co.*, 36 Mo. 303; *Barton County v. Walser*, 47 Mo. 189; *Steines v. Franklin Co.*, 48 Mo. 167.)

It is further urged that because of the misuser of the money paid to the trustees under this contract, the assignees of Gregory have lost all rights acquired by them, and that the State can claim a forfeiture of the privilege granted on that account. The evidence in the case clearly shows that the trustees did not apply the funds realized to the object for which they were intended, and while this breach of duty might have been addressed to the Legislature as a cogent reason for the withdrawal of the bounty bestowed, or the total destruction of the town of New Franklin as a municipality, it does not follow that the State through a proceeding in *quo warranto* can for such cause forfeit and take away the right acquired by the assignees of the Gregory contract. So long as the power conferred by the act of 1835 upon the trustees to contract with other persons for drawing and managing said lottery remained unexecuted by them, the State, through its Legislature, could have taken from the town of New Franklin the right to raise money in that way, such right being a mere bounty, subject to recall or repeal without such repealing law being obnoxious to the prohibition against the passage of a law impairing the obligation of contracts. When, however, this power is executed and a contract concluded, whereby a third person acquires the right to conduct and manage a lottery, another and different question is presented, and the rights thus acquired become vested by the act of the

4. —: vested rights, under: when they cannot be divested by quo warranto.

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State, and cannot be taken away except by the terms of the contract. (*State v. Miller*, 50 Mo. 129; *Clark v. Mitchell et al.*, 64 Mo. 576.) The contract in question imposed no obligation on Gregory or his assignees, to look to the application of the money which the town of New Franklin was authorized to raise.

His obligation was to pay semi-annually the sum of \$250 to the trustees, in consideration of which he acquired the right to exercise the privilege of conducting a lottery until such payments amounted to the sum of \$15,000, and we are at a loss to perceive on what principle the right thus acquired can be taken away, because the town of New Franklin, through its trustees, wasted or misapplied the payment. Neither he nor his assignees had power over the town or its trustees. His duty was to pay, and theirs to make the proper application. If, even, the defendants stood in the place of the trustees, and were responsible for their acts, it might, under the doctrine as laid down in 2 Dill. Mun. Cor., Sec. 720, well be doubted whether the privilege or franchise could be forfeited in this proceeding. It is there stated "that in no instance have the courts of this country declared forfeited the charter or franchise of a municipal corporation for the acts or misconduct of its agents or officers. That this was done by English courts prior to the revolution of 1688, is well known. The case of the city of London is the most conspicuous historical example. It is believed that such a remedy is not applicable to our corporations created as they are by statute for the benefit, not of the officers or a few persons, but of the whole body of the inhabitants and the public."

We have been driven to our conclusions by former adjudications of this court, the correctness of which we do not question. As to the impolicy of the act of the General Assembly in granting the privileges it did to the town of New Franklin, whereby the sale of lottery tickets has for years been authorized, against the sense of the people of the State, and to the debauchery of the public

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morals, we have nothing to say. Nor have we anything to do with the fact that the trustees, in making the Gregory contracts, and the Legislature in ratifying them, have acted unwisely and continued till the year 1877 a business yielding large profits and gains to one contracting party and comparatively small to the other. We are to look to the contract, and, if fairly made, uncorrupted by fraud and untainted by illegal considerations, it is our duty to enforce and uphold the legal rights which it confers. Security to the rights of person and property demands a strict adherence to this rule, and it cannot be overleaped even though the purpose be to correct either a supposed or real great evil.

We are of the opinion that the judgment of the Court of Appeals, as well as that of the circuit court, should be reversed, and the complaint dismissed, which is accordingly hereby done, in which the other judges concur, except Judge NAPTON, who did not sit.

REVERSED.

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CONWAY, by next Friend, v. REED, by next Friend, Appellant.

1. **Infant: LIABILITY FOR TORTS.** An infant is liable for a tort in the same manner as an adult.
2. **Charge of Unlawful Shooting, SUSTAINED BY PROOF OF NEGLIGENCE SHOOTING.** Under the present practice, proof of a negligent or careless shooting will sustain an allegation of an unlawful and wrongful shooting; the same was true, at common law, where an action of trespass for assault and battery was the proper form of action for direct injuries negligently and carelessly inflicted, as well as for those that were intentional and malicious.
3. **Personal Injuries: PRIMA FACIE CASE.** In an action for damages, sustained from injuries caused by an unlawful and wrongful assault and shooting, plaintiff is *prima facie* entitled to a verdict upon proof that he was shot by defendant; it then devolves upon the defendant to show that the shooting occurred without fault on his part, or to put in evidence mitigating facts; it is not necessary that plaintiff, in



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the first place and by direct evidence, should show either an intention to commit the injury or that defendant was in fault.

*Appeal from Buchanan Circuit Court*—HON. JOS. P. GRUBB,  
Judge.

This was an action for damages sustained by respondent in consequence of the alleged unlawful and wrongful shooting of him by the appellant, whereby the amputation of his left leg was rendered necessary, and other injuries were suffered by him. In addition to the denial of the allegations of the petition, the answer set up, as a special defense, that appellant and respondent, and other boys about their own age, twelve or thirteen years, were out playing together, having a gun, and that in the course of their talk and play, whilst the gun was in the hands of appellant, without any fault or negligence, or design on the part of appellant, the gun, without being aimed at or directed towards the respondent, accidentally went off and was discharged, and by accident alone shot respondent, from which he suffered and had to have his leg amputated. On the trial, evidence was offered by appellant tending to show that the shooting was purely accidental and unintentional, and, by respondent, that it was owing to the carelessness and negligence of appellant. The jury rendered a verdict in favor of respondent for one thousand dollars.

The first instruction given by the court at the instance of respondent, was as follows:

1. If the jury believe from the evidence that about the time charged in the petition the defendant shot the plaintiff in the leg with a shot gun, loaded with gunpowder and leaden shot, and which gun the defendant held in his hands, then, *prima facie*, the plaintiff is entitled to a verdict. And if the jury find for the plaintiff, they will assess his damages at such sum as they believe he has sustained, not exceeding ten thousand dollars.

The instructions asked by appellant, and which the court refused to give, are as follow:

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1. That under the pleadings and evidence in this case, the plaintiff cannot recover.

3. Under the law and evidence in this case, the defendant, Reed, not only had the right to carry his gun along with him, but also had the right to carry it loaded; and if the jury believe from the evidence that Conway was shot, without any intention on the part of defendant to shoot him, then the burden of proof is on Conway to prove to the satisfaction of the jury, that such shooting resulted from the careless or negligent manner in which the defendant used said gun at the time.

6. That the defendant is charged in the petition to have been guilty of an unlawful and wrongful assault upon the person of plaintiff on or about the 11th day of April, 1874, and that plaintiff was injured thereby.

7. That every unlawful and wrongful assault upon the person of another includes some degree of malice or some intention, however slight, to do some injury to the person assaulted; and unless the jury believe from the evidence that the defendant was prompted by some degree of malice, or had some intention to injure plaintiff at the time charged in the petition, they will find for the defendant.

*Allen H. Vories* for appellant.

1. The court erred in admitting any evidence of the manner in which plaintiff was shot. The petition stated a case of unlawful, wrongful and willful assault with the gun. The evidence was of an unintentional, accidental shooting on the part of defendant, whilst he, plaintiff and other boys were playing with a gun; and the whole case was tried, and a recovery had upon the supposed careless and negligent manner of using the gun, all variant from plaintiff's petition. A party cannot state one cause of action and recover upon another. He must recover upon his petition, not on the answer of defendant. *Merle v. Hascall*, 10 Mo. 406; *Jones v. Louderman*, 39 Mo. 287;

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*Dougherty v. Mathews*, 35 Mo. 529; *Murphy v. Wilson*, 44 Mo. 313.

2. The first instruction of defendant ought to have been given. It was in the nature of a demurrer to the evidence, and should have been given, as the whole of the evidence varied from the allegations in the petition. And there was a total failure of proof. See Wag. Stat., 1058, § 1.

3. In the case of *Morgan v. Cox*, 22 Mo. 373, which was a cause of action based upon a charge of accidental shooting, the petition charged that the defendant negligently shot the plaintiff's slave. And the only question was as to the fact of negligence. It gave the defendant notice that he was to answer for his negligence. But in the present case, the petition is not based upon a careless or negligent shooting. The defense is, that the shooting was accidental, and without the fault or negligence of defendant. The replication denies this, thus tendering the issue that such shooting was not by accident. Hence the variance was not only material—and the evidence offered operated as a surprise to defendant—but the whole case, evidence and instructions, was tried, and verdict rendered upon the fact whether defendant used said gun carelessly or not.

4. The court erred in giving the plaintiff's first instruction. If the injury had been done intentionally, then, *prima facie*, defendant would have been liable; but if done unintentionally, through carelessness or negligence, then it would devolve upon plaintiff to show such negligence before defendant would be liable. Under the petition, the instruction would be proper; but under the evidence, the burden of proof is on the plaintiff to establish negligence.

*B. F. Loan and Bennett Pike* for respondent.

1. There was no variance between the evidence and the pleadings. The allegation that the injury was unlaw-

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fully and wrongfully committed, included a case of carelessness and negligence. An action lies against an infant to recover damages for an injury inflicted or caused by him, which is not the effect of an unavoidable accident. 3 Wend. 391, *Bullock v. Babcock*; *Sikes v. Johnson*, 16 Mass. 389; *Morgan v. Cox*, 22 Mo. 373; *Vasse v. Smith*, 6 Cranch 226; *Campbell v. Stakes*, 2 Wend. 137.

2. If the injury resulted from inevitable accident, no negligence or wrongful intent could be imputed to defendant; but if the injury was occasioned by the careless and negligent doing of an act lawful in itself, the law holds the person by whom it is inflicted liable to respond in damages to the sufferer. Defendant had a right to carry the gun loaded, but in the exercise of such a right he was required to use extraordinary care. Proof that the act was carelessly or negligently done, sustains the allegation that it was wrongfully and unlawfully done. 3 Wend. 391.

3. It is a rule of good pleading, under the code, that "every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred; and every such averment must be understood as meaning what it says, and consequently is one to be sustained by evidence which corresponds with its meaning." The word assault, *ex vi termini*, means an unlawful act, and an act that causes injury through the negligence of the actor, is as unlawful as if intentionally done. It was unnecessary in this case to show, in order to sustain the allegation of an assault, that the injury was intentional. It was enough that it happened through the negligence of the defendant. Selwyn's N. P., by Wheaton—Assault and Battery, 19; 1 Chitty's Pld., pages 122, 127, 170; *Bullock v. Babcock*, 3 Wend. 391; 44 Mo. 313, *Murphy v. Wilson*.

HENRY, J.—An infant is liable for a tort in the same manner as an adult. *Bullock v. Babcock*, 3 Wendell 391;

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*Campbell v. Stakes*, 2 Wend. 138; *Vasse v. Smith*, 6 Cranch 230; *Morgan v. Cox*, 22 Mo. 374.

It is contended by appellant that, because the petition alleged that defendant unlawfully and wrongfully assaulted the plaintiff and shot him with a gun, evidence of a negligent or careless shooting would not sustain the averment in the petition; in other words, that the petition alleged one cause of action, and the evidence established another, if any. *Bullock v. Babcock*, *supra*, was an action of trespass for assault and battery. The defendant was a boy about 12 years of age, and the evidence showed a negligent shooting of plaintiff by defendant with an arrow from a bow, and it was held sufficient to entitle plaintiff to a judgment.

In *Morgan v. Cox*, defendant was an infant. The petition in that case alleged a negligent killing of plaintiff's slave by defendant, but there is no intimation in the opinion of the court that, if the petition had alleged, as in this case, that defendant unlawfully and wrongfully shot the slave, the evidence that it was the result of carelessness, would not have established the cause of action stated in the petition. Leonard, J., said: "The facts of the present case would, under the former system of procedure, have supported an action of trespass, and cannot, we think, be distinguished from the cases cited. In one of them, the party, in uncocking his gun, accidentally discharged it and wounded a bystander. Here, the defendant accidentally struck the hammer of his gun against his saddle, and the same result ensued. In both cases it was upon the defendant to show that it happened, as the books say, by inevitable accident, and without the least fault, and the change that has been introduced by the new code in the remedy, has not changed the rules of law as to the liability of the parties." The change introduced by the new code in the remedy did not go to the extent of requiring less or more material allegations in a petition than were necessary to constitute a cause of action at common law, but only ob-



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viated the necessity of using those formal and technical averments which, it had been held, were necessary, and for which no other mode of stating the same thing could be substituted. The change introduced, to which the very able judge, who delivered that opinion, alluded, was that made by the first section of the act of December, 1865, Revised Statutes of 1855, page 1216, which provided that there should be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, to be denominated a civil action; and in the third section of article 6, page 1229, requiring in a petition "a plain and concise statement of the facts constituting a cause of action, without any unnecessary repetition."

These sections have been retained in the subsequent revisions. Is it true, that proof of a negligent shooting does not sustain an averment of a wrongful and unlawful shooting? With regard to the liability of the defendant, the law holds an injury inflicted through carelessness, as wrongful and unlawful; if accidental and inevitable, no blame attaches to the person inflicting the injury. He is then, in no sense, culpable. If the act was lawful and right, which is the converse of the proposition, the party inflicting the injury through negligence could not be held liable, and is only responsible because it was unlawful and wrongful.

At common law the plaintiff was held to prove the cause of action alleged in his declaration, with as much strictness as under the code, and yet an action of trespass for assault and battery, as we have seen, was the proper form of action for direct injuries negligently and carelessly inflicted, as well as for those that were intentional and malicious.

The celebrated case of *Scott v. Sheppard*, reported in 2 Wm. Black. 892, and cited and commented upon as often, perhaps, as any case in the books, was an action of tres-

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pass for assault and battery. *Weaver v. Wood*, Hobart 134, cited by Judge Leonard, was in the same form of action. There the defendant, a soldier, had accidentally shot his comrade while exercising. In all these cases, the plaintiffs maintained their actions, although the injuries received by them were proved to have been the result of accidents, and not intentionally committed. In none of them was it alleged in the declaration that the injury was occasioned by the negligence of the defendant. "In declarations in trespass, which lies only for wrongs immediate and committed with force, the injury is stated, without any inducement of the defendant's motive and intention, or of the circumstances under which the injury was committed." 1 Chitty's Pleading 387, 127. The court properly overruled defendant's demurrer to the evidence.

The appellant complains of the first instruction given by the court at the instance of plaintiff, which declared that if defendant shot the plaintiff then, *prima facie*, plaintiff was entitled to a verdict. "A battery is the actual infliction of violence on the person," and, in an action for assault and battery, Mr. Greenleaf says: "The plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault, for if the injury was unavoidable, and the conduct of defendant was free from blame, he will not be liable." Greenleaf 2d Vol. on Evidence, page 81.

We do not understand by this that plaintiff must, in the first place by direct evidence, show either an intention to commit the injury, or that defendant was in fault. If the act was intentional, of course defendant would be liable, and proof of the shooting would make out a *prima facie* case of intentional shooting; and, when proof of the fact that defendant inflicted the injury, is made, it devolves upon him to show that it occurred without fault upon his part, to exonerate himself, or that it was accidental, although occasioned by carelessness, to mitigate.

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The case of *Wakeman v. Robinson*, 1 Bing. 213, cited by Prof. Greenleaf, as supporting the text, certainly does not sustain the proposition of the learned author, if by it is meant that the mere fact of the injury inflicted by defendant does not make out a *prima facie* case, but that plaintiff must, in addition, prove in the first place that it was the result of carelessness on the part of defendant. The defense in that case was that defendant's horse being frightened by the near, noisy and rapid approach of a butcher's cart, became ungovernable, that the injury being thus occasioned by unavoidable accident, without any negligence or default on the part of defendant, he was not responsible for the consequences. The judge who presided at the trial held that this being an action of trespass, if the injury was occasioned by an immediate act of defendant, it was immaterial whether that act was willful or accidental. In the Common Pleas it was held that this was error, and that was the only question discussed by Dallas, C. J., in his opinion. The learned author also cites 1st Comyn's Dig., 129, intending to cite 2nd Comyn; we have found nothing there to sustain the doctrine announced by Prof. Greenleaf, if it is to be understood otherwise than as we have construed the language. Even in a trial for murder, from a proof of the killing with a deadly weapon the law implies an intent to kill, and then it is for the defendant to meet this presumption with evidence showing that it was unintentional, or justifiable, or excusable. "From the simple act of killing, the law will presume that it was murder in the second degree." Wagner, J. *State v. Holme*, 54 Mo. 153.

In the *State v. Underwood*, 57 Mo. 49, the circuit court instructed the jury that if defendant killed Menifee with a gun loaded with powder and bullets, the law presumed the killing to have been intentional, and it was murder in the second degree, in the absence of proof to the contrary, &c., and this court held, Wagner, J., delivering its opinion, that the instruction was unobjectionable. If such be the

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presumption in a prosecution for murder, it certainly will prevail in a civil action, for the law has a more tender regard for life and liberty than for property, and it could only prevail in criminal cases, because it is reasonable that it should. In *Morgan v. Cox*, 22 Mo. 374, already cited, Leonard, J., said: "Under the old system of procedure it was no defense in such cases that the act occurred by misadventure and without the wrong-doer's intending it, but the defendant must have shown such circumstances as would make it appear to the court that the injury done to plaintiff was inevitable, and the defendant was not chargeable with any negligence."

*Castle v. Duryea*, 2 Keyes 169. The defendant was the Colonel of the 7th Regiment of New York State Militia, and at the parade a part of the exercise was to fire with blank cartridges. He personally gave the order to fire, and Mrs. Castle, a spectator, was hit and wounded with a ball. Denio, J., said: "These facts constitute the defendant *prima facie* a trespasser to the same extent as though the musket was fired by his own hand."

This action, as far as appears from the petition, is for an intentional trespass, and when the injury is proved to have been inflicted by defendant, and nothing more, the case is made out, and the defendant must prove that he was not chargeable with negligence as an exoneration, or that it was accidental and not intentional, although negligent, by way of mitigation. The doctrine is very clearly stated by the learned Judge in *Morgan v. Cox*. There are cases in which plaintiff must prove that the party whom he sues for an injury inflicted, was guilty of negligence, but in those cases the action can be sustained only by alleging in the petition and proving negligence. That the injury was negligently inflicted is the foundation of the action. "The burden of proof in an action upon negligence always rests upon the party charging it." *Shearman & Redfield on Neg.*, page 14, § 12. It was not charged in this petition, nor was it necessary to do so.

\* The rulings of the trial court are fully sustained by the authorities, and with the concurrence of all the judges, the judgment is affirmed.

AFFIRMED

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KEY V. JENNINGS *et al.*, Appellants.

1. **Land Entries: RESULTING TRUSTS.** If one owning a government land-warrant issued in the name of another, and not assigned by him, enters land under the warrant for himself, but for want of the assignment makes the entry in the name of the other, the latter takes the legal title to the land as trustee for the former.
2. **Adverse Possession.** When adverse possession is such that it may be presumed that the true owner had knowledge of it, and has acquiesced in it, or, if the indications of the claim and possession are so patent and so open that, if he remained in ignorance, it must have been his own fault, he will be barred, provided that the adverse possession has been continued for the requisite length of time.
3. **Rescission for Misrepresentation.** Erroneous representations as to the title to land made by a vendor without fraud pending the negotiation for a sale, will not authorize a rescission of the contract, if the vendee has received a warranty deed, and has taken and continued to retain possession without opposition.
4. **Rescission for Misdescription.** Misdescription of land in a deed will not authorize rescission of the contract of sale, when it appears that the vendee has been put into possession of the very land which he intended to buy and the vendor intended to sell, and that he has for several years retained undisputed possession; nor when the vendor offers to deliver a deed correctly describing the land.
5. **Rescission must be claimed in a Reasonable Time.** When a vendee of land is entitled to have his purchase rescinded by reason of defects in the title to the land, he must exercise his right within at least a reasonable time after discovering the defects.
6. **Rescission: PARTIAL FAILURE OF TITLE.** A purchase was made of a farm containing 1,269 acres, as to two 40 acre tracts of which there was a failure of title, but it appeared that these tracts were on the outer sides of the farm, and did not destroy its contiguity, or form any special inducements to the purchase; *Held*, that as the substance of the contract of purchase was executed without these tracts,



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the purchaser's remedy for the failure of title thereto was not the rescission of the contract, but a claim for compensation against the solvent vendor

*Appeal from Warren Circuit Court.*—HON. W. W. EDWARDS,  
Judge..

Wm. A. Alexander and Lackland & Broadhead for appellants.

1. Fraud is never presumed; it must be proved by him who asserts it. 1 Story's Eq., Sec. 190. There is no particle of evidence of either actual or constructive fraud

2. A manifest distinction to be traced through all the cases between executory contracts and those which have been executed. In the latter class, where a deed has been made, and possession given, there must be an eviction at law under paramount title, before the court of chancery will interfere, and the vendor, selling in good faith, is not responsible for his title beyond his covenants. *Barton v. Rector*, 7 Mo. 528; *Edington v. Nix*, 49 Mo. 134.

3. The settled doctrine of this court is, that where a party buys a tract of land, receives a deed with a warranty, and goes into possession, he cannot defend against a note given for the purchase money upon the mere ground of speculative defects of title, unless there have been false and fraudulent representations made by him in regard to this title. *Mitchell v. McMullen*, 59 Mo. 256. And there must be the clearest proof of the fraudulent representations, and that the contract was founded on them. *Bryan v. Hitchcock*, 43 Mo. 531; *Langdon v. Green*, 49 Mo. 363, 368; *Holland v. Anderson*, 38 Mo. 59.

4. To avoid a sale for false representations, they must not only be false, and made with the intent to deceive and mislead, but the purchaser must have relied on them and been deceived and damaged in consequence thereof. *Holland v. Anderson*, 38 Mo. 55; *Morse v. Rathbun*, 49 Mo. 91;

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*Cooley v. Rankin*, 11 Mo. 645; *Langdon v. Green*, 49 Mo. 363; *Bryan v. Hitchcock*, 43 Mo. 527.

5. If there is no fraud, and the vendee is in the undisturbed possession, defective title is no ground of relief. The defective title may ripen by time. There must be an eviction, or total failure of title, or such failure as will defeat the objects and purposes of the vendee. *Cooley v. Rankin*, 11 Mo. 645; *Connor v. Eddy*, 25 Mo. 72; *Mitchell v. McMullen*, 59 Mo. 252; *Barton's Admr. v. Rector*, 7 Mo. 528; *Edington v. Nix*, 49 Mo. 134.

6. The two forties are not essential in any way to the value of the farm, were never made use of by any of the owners of the farm, and are on the outskirts of the tract. At most the failure of title thereto, can only be a breach of the warranty *pro tanto*, for which redress can be sought in a suit on the deed. Merritt's estate is amply solvent. *Hart v. Handlin*, 43 Mo. 175.

*Wagner, Dyer & Emmons* for respondent.

1. There was no attempt to offer a good title to the land. Plaintiff was not bound to accept a quit-claim, or rely upon the statute of limitations to any of the land. He was entitled to an indefeasible title. Although there may have been no fraudulent intent on the part of Merritt in showing the wrong boundaries, and representing the water and timber as being on the land sold, still, plaintiff, on offering to deliver up the premises, as he does, is entitled to rescission on the ground of mistake. This is not an action at law seeking to recover damages, but it is a bill asking equitable relief, where both parties may be restored to their former position. The distinction between the two classes of cases was pointed out in *Dunn v. White*, 63 Mo. 184. A substantial error between the parties, concerning the subject-matter of the contract destroys the consent necessary to its validity. 2 Kent Com., 471; and this principle has frequently been applied in equity in the rescission of executed

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contracts for the sale of real estate. 1 Story's Eq., § 142; *Hitchcock v. Giddings*, 4 Price 135; *Mead v. Johnson*, 3 Conn. 597; *Bradley v. Chase*, 22 Me. 511; *Davis v. Heard*, 44 Miss. 51; *Armstead v. Hundley*, 7 Gratt. 64; *Smith v. Mitchell*, 6 Ga. 458; *Dale v. Roosevelt*, 5 Johns. Ch. 182; *Champlin v. Laytin*, 6 Paige 197; *Daniel v. Mitchell*, 1 Story 172; *Mason v. Crosby*, 1 Woodb. & Min. 352; *Glasscock v. Minor*, 11 Mo. 655; *Rawlins v. Wickham*, 3 D. & J. 317; *Hough v. Richardson*, 3 Story 659; *Doggett v. Emmerson*, 3 Story 733; Kerr on Fraud and Mistake, p. 60, Am. note; *Leyland v. Illingworth*, 2 D. F. & J. 253; *Pitts v. Cottingham*, 9 Porter 675; *Lewis v. McLemore*, 10 Yerg. 206; *Barton v. Rector*, 7 Mo. 528; *Duke of Norfolk v. Wortly*, 1 Camp. 337; *McFerron v. Taylor*, 3 Cranch 270.

NORTON, J.—This suit was instituted in 1872 in the circuit court of Warren county, to enjoin and restrain defendant, Jennings, as trustee, from selling certain lands hereinafter described, and also to rescind a contract whereby one Abel S. Merritt sold and conveyed to Thomas Key, the plaintiff, and Nicholas Key, the lands, the sale of which was sought to be enjoined.

The petition alleges that in 1867 plaintiff desired to purchase 1,200 or more acres of land, lying in a body, well watered and suitable for the purposes of a stock farm; that A. S. Merritt represented to him that he was the owner of such a farm in Warren county, containing 1,269 acres, that his title thereto was clear and perfect; that Merritt pointed out the same to plaintiff, and showed him the boundaries of the following land: 560 acres, being all of section 6, except the ne qr. of the ne qr. and the se qr. of the ne qr., in township 47, range 2 west; 100 acres, being the south half of the sw qr., and 40 acres, being the sw qr. of the se qr. of section 31, township 48, range 2 west; 80 acres, being the south half of the se qr.; 40 acres, being the nw qr. of the se qr.; 80 acres, being the east half of the sw qr. of section 36, township 48, range 3 west; 169

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acres, being the ne qr. of section 1, township 47, range 3 west; 40 acres, being the sw qr. of the sw qr. of section 5, township 47, range 2; 80 acres, being the east half of the sw qr. of section 5, township 47, range 2 west, and 80 acres, being the east half of the nw qr. of section 8, township 47, range 2 west, containing in all 1,269 acres, more or less; that relying on the representations of said Merritt as to the location and contiguity of said land, and that there was upon it a never-failing stream of water, and his title thereto perfect, plaintiff, on the 7th of June, 1867, was induced to purchase the land at the price of \$25,000—\$1,000 of which was paid at the time, and the remainder to be paid as follows: \$8,000 on the 1st of January, 1868; \$8,000 in two years from June 7th, 1867, and \$8,000 in four years, with interest at 6 per cent.; that, on the 3rd of July, 1867, the said Merritt and wife executed and delivered to plaintiff a deed of general warranty for what plaintiff supposed to be the above described land, and that plaintiff, to secure the notes given for the deferred payments, executed and delivered to defendant Jennings, as trustee, a deed of trust on the lands thus conveyed by Merritt; that 560 acres of the land described as being in section 6, T. 47, R. 2 west, is by said deed located in township 48, range 2 west, which places it six miles north of the balance of the tract, and that the lands conveyed by the deed do not lie in a body, but are separate and far apart, thus defeating the object of plaintiff in buying the same as a stock farm.

It is further alleged that Merritt was not the owner of the land in section 6, township 47, range 2, which he showed plaintiff and agreed to convey; that he never had title thereto and could not convey the same. It is also alleged that Merritt never had title to the north half of the sw qr. of the se qr. of section 31, township 48, range 2, nor to the south half of the sw qr. of section 5, and ne qr. of the sw qr. of section 5, township 47, range 2, nor to the south half of the se qr. of section 36, township 48, range 3 west, making in the aggregate

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800 of the said 1,269 acres, to which Merritt had no title.

It is also alleged that said land was encumbered by mortgages, and that plaintiff had paid in the aggregate the sum of \$13,179.38 on the notes given by him to Merritt; that plaintiff, by reason of the misrepresentations and fraud practiced by Merritt, had been deceived as to the location and title to said lands; that the never-failing stream of water, which was the controlling inducement for the purchase of said farm, is not located on any land to which Merritt had title, either in law or equity, and that such failure of title defeats the whole object of plaintiff's purchase of said land for a stock farm. It is further alleged that Jennings, the trustee, was about to sell the lands for the unpaid purchase money; that Merritt had since died, and after making the administratrix of his estate a party, it prays for an injunction restraining the trustee from enforcing a sale under the deed of trust; that the contract be rescinded, the notes given up and canceled, and for an account, &c.

The defendants, in their answer, deny each allegation in the petition. They deny that the 560 acres was described in Merritt's deed to plaintiff as in township 48, range 2, and aver that it was in township 47, range 2, and is part of the 1,269 acres sold to plaintiff; that Merritt was the owner in fee of it, and never owned, or pretended to own any land in township 48, range 2, and if it is so described in said deed, it is a misdescription and did not mislead plaintiff. It is further averred that the land sold to plaintiff was purchased by Merritt in 1863, of the assignees of Warren Stewart, and was known and sold to him as the Warren Stewart farm; that prior to said sale, said tract of 1269 acres (of which the said 560 acres was a part) had been owned, occupied and possessed by Stewart as a stock farm, and as his own property, for a period of not less than ten years, and that if, in the deed of said assignees to Merritt, there is a failure to describe the said 560 acres as being in



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township 47, range 2, it is a mere clerical error; that said Stewart never owned 560 acres of like quality or description in township 48, range 2 west; that when Merritt purchased of said assignees, he took possession of all said land, and when Merritt conveyed to plaintiff the land known as the Warren Stewart farm, he conveyed by the same description, and put the plaintiff in possession thereof, and that he has remained in the undisputed and undisturbed possession ever since.

It is further averred that the 560 acres is described in the deed of Stewart to his assignees as being in township 47, range 2, and that the assignees, in their deed to Merritt, omitted the words in "township 47, range 2, west," and Merritt, in his deed to plaintiff, also omitted the same words; that by this omission, the title derived by plaintiff, through Merritt's deed, cannot be affected, inasmuch as the deed from the assignees to Merritt refers to the deed from Stewart to the assignees, in which the land is correctly described as in township 47, range 2. Defendants also tender in their answer a quit-claim deed from the assignees of Stewart, containing a correct description of the said 560 acres. It is further alleged that Merritt put plaintiff in possession of the land sold, and that he has been in peaceable and undisturbed possession thereof ever since, and that Merritt and those under whom he claimed had held and occupied the same exclusively and adversely as their own property, under color of title, for more than ten years prior to the sale of the land to plaintiff. It is also averred that the estate of said Merritt is perfectly solvent, and that plaintiff would be amply protected by the covenants of the deed, in the event of his eviction from any part of the premises.

The reply of plaintiff is a full denial of the answer. The decree of the court finds the issues for plaintiff, perpetuates the injunction, rescinds the contract, and enters judgment for plaintiff for the sum of \$10,369.45, which is declared to be a special lien on said land. Motion for re-

view and new trial having been overruled, defendants bring the case here by appeal.

The court below found the following facts: That plaintiff purchased the land for the purposes of a stock farm; that Merritt represented that it was a good stock farm, and by his agent, Steel, pointed out to plaintiff the lands claimed by Merritt, and as part thereof, the se qr. of section 6, township 47, range 2, and south half of sw, section 5, township 47, range 2; that the latter tracts, comprising 120 acres, had on them the only living water, and the principal timber, without which, the farm was of little value as a stock farm, and that Merritt had no title to these tracts. The court also found that Merritt had no title to the ne qr. of sw qr., section 5, township 47, range 2, nor to the sw qr. of se qr., section 31, township 48, range 2. Upon the above findings the court based its decree perpetuating the injunction and rescinding the contract.

The only evidence tending to support the finding as to representations of Merritt that the farm was a good stock farm, and that he had a good title thereto, is to be found in what Nicholas Key, one of the vendees testified to, which is as follows: "We bought the land from A. S. Merritt; and my cousin, Thomas Key, and myself, paid him \$1,000 down, in the beginning of June, 1867. I was present with Thomas Steel when we examined the farm. Steel had possession for Merritt. We went around over the farm, and examined it. Merritt told us Steel would show us the farm, which he accordingly did, taking a wagon and hauling us around the farm. Steel told us the stream of water belonged to Merritt; also the timber on the other side of the stream, towards Mr. Shelton's. I can't say how far this was from the house; can't say what section the water and timber is on. The water and timber was in our possession while we lived there. It was put into our possession by Merritt. The other side of the creek from the house is open land.

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Thomas Key is now in possession of the timbered land and water, and of all the 1,269 acres." There is not only nothing in this evidence supporting the finding as to representations of Merritt, that the farm was a good stock farm, that the land was in a body, or that the timber and water was upon it, or that plaintiff relied upon them, but, on the contrary, it shows that plaintiff went to look at the land before purchasing, and inspected it for himself. If the representations made by Steel—to whom plaintiff had been referred by Merritt, as a person who would show plaintiff the farm, that the stream of water belonged to Merritt, also the timber on the other side of the stream towards Shelton's—are to be regarded as if made by Merritt himself, we think it is not sufficient, in view of the other evidence, to justify the finding and decree.

The evidence shows that the plaintiff received from Merritt, in 1867, a deed, with covenants of warranty for 1,269 acres of land in the aggregate; that he was put in possession of it, and has remained in the undisturbed possession of it ever since; that there is no person asserting title to the land on which the timber and water is located; that the south half of the sw qr. of section 5, and se qr. of the se qr. of section 6, township 47, range 2—the tracts containing the timber and water—was entered in 1852 by Stewart, in the name of one Thurmond, by locating upon it a land warrant, which Stewart had previously purchased of said Thurmond; that the land warrant was located in Thurmond's name, because Thurmond made no assignment at the time he sold it, and neither he nor Thurmond knew that an assignment was necessary to enable Stewart to locate it in his own name.

Shelton, a witness, testifies that he lived close to the Thurmond land, that the living water is on it on the se qr. of the se qr. of section 6, township 47, range 2; that there was no living water on the Stewart farm, except that on the Thurmond land; that Stewart made ponds on the land

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while in possession; that the whole tract was known as the Stewart farm; that there were houses and barns and an orchard on it; that 500 acres or more, were under fence; that the improvements were about a quarter of a mile from the water; that Stewart had had possession of the farm and improvements since he first bought, and that he bought the first land between 1845 and 1850; that Merritt took possession about the time he bought from Stewart's assignees, and that Stewart or his assignees held possession up to that time; that the twelve hundred and odd acres are called and known as the Stewart farm, and that he never heard Stewart nor anybody else say that the Thurmond land was not Stewart's, but it was generally considered a part of the Stewart farm; that Stewart had principally made his improvements from the timber off the Thurmond land—the main timber of the Stewart farm being on that land.

Dyer, a witness, testified that since plaintiff bought, he had put in all about three and one-half miles of fencing; that there was then in cultivation between six hundred and one thousand acres; that Stewart had possession of the farm several years before he made his assignment for the benefit of his creditors, and claimed that he had from four to six hundred acres in cultivation.

On the part of defendant, Jennings, the trustee, testified that Merritt's estate was perfectly solvent, and the same fact was testified to by M. A. Wolf. P. P. Stewart testified that he was attorney for plaintiff; that he knew the Warren Stewart farm; knew how long Stewart had it in possession; that he had the whole tract in possession before the deed made by him to the assignees; he always claimed the farm as his own; he claimed the Thurmond land as his land; that he went to settle between them; about that time Thurmond left the country, perhaps four years before Stewart made his assignment; Thurmond did not claim the land; Stewart and Thurmond both told him that he, (Stewart,) had bought a land warrant

from Thurmond, for \$150, and Stewart took the land warrant to St. Louis and located it on the Thurmond land in the name of J. Thurmond, for himself, Stewart; that they did not know that an assignment of the warrant was necessary; that Stewart sent him to Thurmond to try and make a settlement, and get him to accept the \$150 for the land warrant, and get him, Thurmond, to give him a quit-claim deed, which he refused.

Hill testified that he had long lived in the county; knew the Stewart farm, and first knew Stewart in possession of it, in 1849 or 1850.

J. C. Dyer testified that he had lived adjoining the Stewart farm since 1849; that Stewart had the farm when he went there, and claimed to have 1300 acres in it, and had possession of it till he sold; that Thurmond lived in Montgomery county, and that he set up no claim to the Thurmond land.

Morsey testified that he was county surveyor in 1845 or 1846, and surveyed some of Warren Stewart's land; that he ran a line between the section corners of sections 5 and 6 and other lines, and established corners; that all the land was known as the Warren Stewart farm; he claimed 800 acres and 640 acres, less an 80 acre tract, making about 1300 acres.

The above evidence satisfactorily establishes the fact that the land conveyed to plaintiff, and spoken of in the evidence as the Thurmond land, on which  
1. LAND ENTRIES:  
resulting trusts. was located the water and principal timber, although entered in the name of Thurmond, was in fact entered by Stewart, for himself, with a land warrant which he claimed to have bought of Thurmond, and which Thurmond admitted he sold him, and it was located in the name of Thurmond because it was not assigned, which neither Stewart nor Thurmond knew was necessary. The equitable title was thereby vested in Stewart, and the entry having been made in Thurmond's name, had no other effect



than to invest him with the mere legal title as trustee for Stewart.

Besides this, the evidence shows that after it was so entered, although Thurmond had knowledge of the fact, that Stewart claimed the land as his own, cut the timber from it with which to improve his farm, he never set up any claim nor disputed Stewart's right to it. The evidence shows that from four to eight years previous to the assignment which Stewart made in 1860, conveying this land to assignees for the benefit of his creditors, Thurmond had actual knowledge that it was claimed and held adversely to him, by Stewart, as part of his farm; that it was so held by Stewart's assignees till 1863, when they sold it to Merritt, and was so held by Merritt till 1867, when he sold it to plaintiff, and has been so held by him ever since, thus establishing an adverse claim and holding with the knowledge of Thurmond, of between fifteen and twenty years, up to the time this suit was instituted in 1871. It has been held by this court, that when the adverse possession is such that it may be presumed that the true owner had knowledge of it, and acquiesced in it, he will be barred, provided it has continued the requisite length of time. If the indications of the claim and possession are so patent and so open, that if he remained in ignorance it must be his own fault, the like result will follow. *Draper v. Shoot*, 25 Mo. 197; *Fugate et al. v. Pierce*, 49 Mo. 441; *Musick v. Barney*, 49 Mo. 458. In the case before us, nothing is left for presumption, as the evidence shows actual knowledge on the part of Thurmond, of Stewart's claim and possession, and acquiescence in it. The evidence further shows that plaintiff was in quiet enjoyment, never having been disturbed in his possession, and that no claim had been set up by any person to so much of the Thurmond land as contained the timber and water.

The doctrine of this court has been that when a

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party buys a tract of land, receives a deed with warranty. **3. RESCISSION FOR MISREPRESENTATION.** and goes into possession, he cannot defend against a note given for the purchase money upon the mere ground of speculative defects in the title, unless there have been fraudulent and false representations made to him in regard to the title. A mistake of the vendor as to the validity of his title may easily occur, and his warranty deed is designed to protect the purchaser against such defects. It is a dangerous and delicate operation for a court to pass upon a title which nobody is asserting, and no one disputing. The vendee is in possession, and no one is controverting his title, except the vendee himself, and that for the purpose of avoiding the payment of the purchase money. *Mitchell v. McMullen*, 59 Mo. 252; *Connor v. Eddy*, 25 Mo. 75. A purchaser of land who has taken a conveyance, with covenants for title, and is in the undisputed possession, will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud in the sale nor eviction. *Wheeler v. Standley*, 50 Mo. 10.

In the case we are considering, there has been no eviction from any of the land, constituting the inducement to the purchase. Do the representations made by Steel, as the agent of Merritt, even if he were mistaken, amount to such a fraud as to authorize a rescission of the contract? The representation was that Merritt owned the Thurmond land, on which was located the timber and water. It is not pretended that the representation was prompted by an actual fraudulent purpose. Steel, in making it, but reiterated what the evidence shows to have been the common understanding of the neighborhood in which the land was situated. It had been claimed and held adversely by Stewart and Merritt for more than ten years prior to that time, and this claim was acquiesced in by Thurmond, in whom plaintiff claims the legal title was vested.

It was held by this court in the case of *Langdon v.*

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*Green*, 49 Mo. 363, that fraudulent misrepresentations and concealments by the vendor of land, as to the nature, quality, quantity, situation and title thereof, affecting the whole subject-matter of the contract, will entitle the vendee to relief; but such misrepresentations must be as to some material thing unknown to the vendee, either from not having examined or from want of opportunity to be informed, or from special confidence reposed in the vendor. And in such cases there should be the clearest proof of the fraudulent representations, and that they were made under such circumstances as showed that the contract was founded upon them. In such transactions parties must not neglect to use their own discretion and judgment. *Holland v. Anderson*, 38 Mo. 556; *Bryan v. Hitchcock*, 43 Mo. 527; *McFarland v. Carver*, 34 Mo. 195; *Edington v. Nix*, 49 Mo. 134; 1 Story Eq., Sec. 200.

In *Cooley v. Rankin*, 11 Mo. 643, it was said: "That the vendor is alleged to be guilty of fraud in representing that he had title, when he had none. If this be fraud, then every breach of warranty must be attended with fraud. The sufficiency of title to land may often depend upon questions of law, about which, the most learned may differ; and it would be strange, if men who had not made the law their profession, were exempt from errors in their opinions and representations on such a subject. There is no principle of equity which holds men responsible for such representations, if made in good faith."

In regard to the 560 acres in section 6, claimed by plaintiff to be described in Merritt's deed as being in township 48, range 2, it may be said that if thus described, it is clearly a misdescription, which the evidence fully establishes. That description would place it in Montgomery county, six miles north of the land actually shown to plaintiff and purchased by him. He was not misled by it, because he took possession under the deed of the 560 acres in section 6, township 47, range 2, on which was situated the dwelling houses, barns, fields and

4 RESCISSION FOR  
MISDESCRIPTION.

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orchard, and has held the possession ever since, and prior to that time it had been in the possession of Stewart and his vendees, since 1845 and 1850. Equity deems that to be done which the parties intended to do. Admitting that the land was described as being in "township 48, range 2," still the plaintiff acquired such a title in equity to the land in township 47, range 2, as would bind the vendor, his heirs, voluntary grantees or purchasers with notice, as the evidence conclusively shows that was the land plaintiff bought, and that Merritt sold and intended to convey. *Welton v. Tizzard*, 15 Iowa 495; *Rhodes v. Outcalt*, 48 Mo. 367.

Besides this, defendants offered to and were ready to correct this mistake. This the plaintiff was unwilling to accept, although he had not been misled by it, and was then, and had been, from the time of his purchase, in the actual enjoyment of the very land he bought, but which, by clerical mistake, had not been fully described. This, in connection with the fact that plaintiff, although he discovered the alleged defects in the title soon after his purchase in 1867, rested at ease for a period of more than four years without taking any steps to rescind the contract, till after Merritt's death, evinces more of a desire on his part to sell back to Merritt's heirs the land he bought, at the price he bought it for, than to stand upon the equities of his case.

In the case where the purchaser has the undoubted right of rescission on discovery of the defect, he has his election to affirm and look to the vendor for compensation, or to disaffirm and ask a rescission, but he is bound to exercise that election at least within a reasonable time after the discovery of the defect. "He is not at liberty to hesitate and delay and wait, for a future of his own convenience or the market value of the property, before determining the question of affirmance or rescission." *Hart v. Handlin*, 43 Mo. 175; 1 Story Eq., Sec. 203.

The evidence shows that plaintiff, as early as July, 1867, knew that Dyer, Burgess and Leek were in possession of 80 acres of the land, and that in September, 1867, he knew of the alleged defect of title to the Thurmond land. He not only remained quiescent, during a period of four and a half years, without taking any steps to rescind, but on the contrary, after this knowledge came to him, he paid on his outstanding notes, given for the purchase money at various times from February, 1868, to March, 1870, sums aggregating \$10,964.33, making in the meantime, three and one-half miles of fencing on the premises. No steps were taken till about one year after Merritt's death, when this suit was instituted. Till then all the acts of plaintiff look to an affirmance of the contract, and reliance on the covenants in the deed.

While we do not think the evidence justifies the finding of the court that Merritt had no title to the Thurmond land, we think that it is sufficient to show that there was a failure of title as to the ne qr. of the sw qr., section 5, township 47, range 2, and the sw qr. of the se qr., section 31, township 48, range 2, aggregating 80 acres. It does not, however, appear that these tracts, which are on the outer sides of the whole tract, destroy its contiguity or that they constituted any special inducement to the purchase. The failure of title, in respect thereto, is not such as to authorize a rescission of the contract, as the substance of it is executed without them, and plaintiff's remedy is by way of compensation against Merritt's estate, which, according to the evidence, was perfectly solvent. *Hart v. Handlin*, 43 Mo. 175.

For the reasons stated the judgment will be reversed and the bill dismissed, in which the other judges concur.

REVERSED.



THE STATE V. MOORE, *Appellant*.**Autrefois acquit: LARCENY OF MONEY, NATIONAL BANK NOTES: EVIDENCE.**

A plea of *autrefois acquit* to an indictment for stealing a national bank note, is sustained by proof of an acquittal upon an indictment for stealing money accompanied by evidence that both indictments were for the same act.

Under Sec. 31, p. 1091, Wag. Stat., evidence of the theft of the note was admissible in support of the indictment for stealing money, (*overruling State v. Kroeger*, 47 Mo. 530).

*Appeal from Daviess Circuit Court.*—HON. SAMUEL A. RICHARDSON, Judge.

*Shanklin, Low and McDougal* for appellant.

*Rush, Jr.*, with *J. L. Smith*, Attorney-General, for the State.

HENRY, J.—At the February term 1876, of the circuit court of Livingston county, defendant was indicted for grand larceny, charged with having, on or about the 20th day of December, 1875, stolen a piece of money made and issued under the laws of the United States, of the value of twenty dollars, and two pieces of money made and issued under the laws of the United States, each of the value of five dollars, and the property of one William Jones. At the same term there was a trial of the cause on defendant's plea of not guilty, and he was acquitted by the jury. Afterwards, at the same term of said court, he was again indicted for grand larceny, charged with having, on or about the 20th day of December, 1875, stolen one piece of money, to-wit: a national bank note, made and issued by the First National Bank of Greencastle, in the State of Pennsylvania, of the denomination of twenty dollars, made and issued under and by virtue of the laws of the United States, and the property of one William Jones. To this defendant pleaded *autrefois acquit*, alleging his former trial and acquittal, and that the larceny of which

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he was so tried and acquitted, was the same for which he was again indicted, and that the William Jones mentioned as the owner of the property stolen in the first indictment was the same William Jones mentioned as owner of the property in the last indictment, &c. To this plea a replication was filed and on a trial of the issues on the plea of *autrefois acquit* defendant introduced, as a witness, Hamlet Wynn, who testified that he was the prosecuting witness in the case, and was a witness at the former trial of the *State v. Charles P. Moore*, that he then testified that he caught defendant at the Grand river bridge, asked him for the money and defendant gave it to him, that he did not, on the former trial, describe the bill, and that he told no more for the reason that defendant's counsel stopped him and would not let him tell about anything but coin. He was the only witness introduced. He "started to describe the bill at the former trial but defendant's counsel stopped him as soon as he said 'one of the bills was a twenty dollar greenback,'" and the court then ruled that no testimony, except about coin, was admissible under the indictment. He then testified that there was but one taking that he knew anything about, and that it was the same he testified to on the former trial and now. The Prosecuting Attorney, to obviate the necessity for further proof, admitted that there had been but one larceny, and that of money belonging to William Jones. Defendant then introduced in evidence the first indictment and the verdict and judgment thereon.

The court of its own motion instructed the jury, that "under the evidence on this trial, they must find the issue for the State," and the jury so found. Defendant then pleaded not guilty to the indictment, was tried, convicted and his punishment fixed at two years imprisonment in the penitentiary, and he brings his case here by appeal. When the former indictment might have been sustained by showing the offense charged in the second, a *prima facie* case is made out for the prisoner. *The People*

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*v. McGowan*, 17 Wendell 386. Or whenever there has been but one larceny and the same evidence will support either indictment, *autrefois acquit* is a good plea, but unless the first indictment was such that the prisoner might have been convicted upon it by proof of the facts contained in the second, an acquittal on the first is not a bar. Chitty's Crim. Law 483; Archbold Crim. Pl. 88.

The 31st section of the act relating to practice in criminal cases (Wag. Stat., p. 1091) provides that, "In every indictment in which it shall be necessary to make any averment as to any money, or any note, being or purporting to be made or issued by any bank incorporated by law, or made or issued by virtue of any law of the United States, it shall be sufficient to describe such money or note simply as money, without specifying any particular coin or note; and such allegation shall be sustained by proof of any amount of coin, or of any such note, although the particular species of coin of which such amount was composed, or the particular nature of such note, shall not be proved, &c." The balance of the section does not affect the question under consideration. The first indictment against the defendant used the language of the statute and charged the defendant with having stolen "a piece of money made and issued under the laws of the United State, of the value," &c. Now it is very clear, that under that section, the State could have proved the very theft alleged in the indictment on which defendant was convicted. Proof would have been admissible on the part of the State under that indictment, of the stealing by defendant of any money, coin, national bank notes or treasury notes, the property of William Jones. The averment was that the piece of money stolen was made and issued under the laws of the United States, and proof of the specific larceny charged in the second indictment, would fully have proved every averment in the first. *State v. Kroeger*, 47 Mo. 530, in which a different doctrine was announced, is overruled in that respect.

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National bank notes are money within the meaning of the 31st section, and are made and issued under the laws of the United States. It being a principle well established, that when the first indictment was such that the prisoner might have been convicted upon it, by proof of the fact contained in the second, an acquittal on the first is a good plea in bar to the second, the instruction of the court to the jury, to find the issue on the plea of *autrefois acquit* for the State was erroneous; and, as on proper instructions upon the evidence on the issues made by that plea, the jury must have found for the defendant, and virtually acquitted him of the larceny charged in the indictment on which he was convicted, the judgment, with the concurrence of all the judges, is reversed, and the prisoner discharged.

PRISONER DISCHARGED.

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THE STATE *ex rel.* MEINZER, *Appellant*, v. DIVELING.

1. **Interpretation of Statutes.** When the words of a statute are so ambiguous as to create a doubt as to their true meaning, recourse may be had to the occasion of the provision, the mischief complained of and the remedy sought to be applied by the law maker. When the intent has been ascertained, it may be followed, though not strictly according to the letter of the act.
2. **Homestead Law: SEC. 7 CONSTRUED.** The intent of section 7 of the Homestead Act, (Wag. Stat., p. 698,) is to secure to every head of a family who had an existing estate in lands **at** the time of the passage of the act a homestead free from the payment of debts contracted after that date, and to secure to every such person subsequently acquiring an estate, a homestead in it free from liability for debts contracted after the date of the filing for record the deed by which the title was acquired.

One who, prior to the passage of the act, had entered government land, received a certificate of entry, and was living with his family upon it, but had never taken out a patent, had an existing estate

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within the meaning of section 7, so that it could not be taken for a debt subsequently contracted.

3. **A Fraudulent Conveyance of a Homestead** by the head of a family, does not produce a forfeiture of the benefits of the homestead exemption (*following Vogler v. Montgomery*, 54 Mo. 577).

*Appeal from Schuyler Circuit Court.*—HON. JOHN W. HENRY, Judge.

The homestead act was passed March 20th 1866.

*Higbee & Shelton* for appellant.

1. Jacob Diveling could not claim the land as his homestead, nor can his widow, as against the relator's demand. Wag. Stat., p. 698, § 7; 1 Am. Law Reg. (N. S.) 648, 649, note; *Shindler v. Givens*, 63 Mo. 394; *Lincoln v. Rowe*, 64 Mo. 138; *Farra v. Quigly*, 57 Mo. 284. The entry is noted on the plat book of entries; but no patent was ever issued, and Diveling never had any title of record. A patent to land from the government is entitled to record the same as any other conveyance. By obtaining one and filing it for record, he might have obtained the benefit of the act.

2. The decree in the cause between Frederick Meinzer, as plaintiff, Sibilla Diveling, as administratrix of the estate of Jacob Diveling, deceased, and John W. Diveling, defendants, estops the present defendants from pleading that said lands were the homestead of deceased. 1 Am. Law Reg. (N. S.) p. 710; *Union R. R. & T. Co. v. Traube*, 59 Mo. 362; *Gould v. R. R. Co.*, 91 U. S. 533.

*F. T. Hughes* for respondent.

1. A construction of the 7th section that would exclude all persons in the State from the benefits of our homestead law, who have not procured a patent from the general government, and had the same recorded in the proper county, would certainly be a very narrow and cold con-



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struction of the act, one which our Legislature never could have intended, whatever language it may have used in drafting the section. But I am sure the language of the section admits of no such construction.

2. Diveling had an existing estate when the act was passed, and no record of deeds is necessary.

3. The action of the court in setting aside the deed of Diveling to his son, made during his life time, cannot avail relator. If the deed was fraudulent, the title remained in the father, and at his death vested in his wife and minor children as homestead; if not, then the title was in the son, and relator cannot sell it for debts of deceased. *Vogler v. Montgomery*, 54 Mo. 583.

NORTON, J.—This is a suit instituted on the bond of Sibilla Diveling, administratrix of the estate of Jacob Diveling. It appears from the pleadings in the case that in 1869, Jacob Diveling executed his note to relator for the sum of \$500; that after the execution of said note the said Diveling made a voluntary conveyance of one hundred and sixty acres of land in Schuyler county, to John W. Diveling; that relator obtained judgment on said note against said Diveling in the Schuyler county circuit court, and instituted a proceeding in said court against John W. Diveling and Sibilla Diveling, administratrix of Jacob Diveling, he, the said Jacob, having in the meantime died, and relator having before the institution of said proceeding, had an allowance against his estate in the probate court of said county for \$257, which was assigned to the fourth class of demands. Said proceeding resulted in a decree declaring the conveyance from Jacob Diveling to John W. Diveling fraudulent and void as to creditors, and directing Sibilla Diveling, administratrix, to make and file an inventory of the land thus attempted to be conveyed to John W., in the probate court of said county. The failure by the said Sibilla to make and file this inventory of

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the land, after having been requested to do so by relator, is the alleged breach of the bond.

Defendants, in their answer, admit the refusal of the administratrix to inventory the land, and allege that she was not bound to do so, because the land in question was the homestead of said Jacob Diveling, and not subject to the payment of relator's debt.

On the trial it was admitted that the land in question was entered by Jacob Diveling, deceased, in November, 1852, and that the certificate of entry was issued to him, and that no patent was ever issued to said deceased in his lifetime, and has not been issued by the United States government for said land, and the said deceased has no conveyance of any kind to him of record, except an entry upon the plat book, which is duly certified and on file in the recorder's office for the record of deeds in Schuyler county, previous to the accruing of plaintiff's demand; that said plat shows that the deceased, Jacob Diveling, duly entered said land before the accruing of plaintiff's demand. The cause was submitted to the court upon the above state of facts, without the intervention of a jury, and judgment was rendered in favor of defendants, from which plaintiff has appealed.

It is urged, as a reason for the reversal of the judgment, that the facts admitted show that the land in question was not such homestead, as under the law exempted it from sale for the satisfaction of relator's debt, because no deed showing title in Jacob Diveling had been placed on record anterior to the contracting of the debt to relator. The question here presented involves a construction of the 7th section, Wag. Stat., p. 698, which is as follows: "Such homestead shall be subject to attachment and levy of execution upon all causes of action existing at the time of acquiring such homestead, except as herein otherwise provided; and for this purpose such time shall be the date of the filing in the proper office for the record of deeds, the deed of such homestead; and, in case of existing estates,

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such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created."

This section is somewhat obscure, and in construing it, regard should be had to the true intent of the law, the discovery of which is the object of all rules of interpretation. When the words are unambiguous, they of course must govern. But when the terms of the law are so ambiguous as to create a doubt, recourse may be had to the occasion of the provision, the mischief complained of, and the remedy sought to be applied by the law maker. When there can be no question as to the intent, it may be followed, though not strictly according to the letter of the law.

Searching then for this intent, it is manifest from the whole frame work of the statute creating homesteads, of which the section quoted is a part, that the Legislature intended that each householder or head of family in the State should be allowed to claim, as a homestead, certain real estate, limited in quantity, and also in value, free from seizure and sale, either on attachment or execution. But as it would be unjust to confer that right as to existing estates, without providing that such homestead should be liable for debts existing at the time of the passage of the law, section 7 was inserted to accomplish that purpose, and the further purpose of providing in what cases homesteads acquired subsequently to the enactment should be subject to seizure and sale on execution. We, therefore, think, that the intent of section 7, though not very clearly expressed, was to secure to householders or heads of families having an existing estate in lands at the time of the passage of the law, a homestead in such estates free from the payment only of debts contracted after the passage thereof, and to secure to persons not having existing estates at the time of its enactment, homesteads in lands acquired subsequently thereto, free from liability only for debts contracted after the date of the filing for record, the deed through or by which the title was acquired. This construction gives effect to the whole section, whereas, if

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the one contended for should be adopted, the words "in cases of existing estates," occurring in the last clause of the section, would be without meaning.

We have no doubt but that Diveling, deceased, was entitled to the land as a homestead, and that as such it was not subject to the payment of relator's claim. The land was entered by Diveling in 1852, he had a certificate of entry upon which he could maintain ejectment, he had an existing estate in the land at the time the law was passed, and the debt for which relator is seeking to make it liable was contracted in 1869, and the section in question forbids the sale of the land thus acquired by Diveling in the following language: "and (in case of existing estates), such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created." Under this view the case of *Shindler et al. v. Givens*, 63 Mo. 396, to which we have been cited, has no application to the case we are considering. In that case the title to the land claimed as a homestead, was evidenced by deed dated in 1870, which was not placed on record till 1874. The debt for which the land was sought to be made liable, was contracted prior to the date of filing the deed for record; and for the reason that the estate was acquired after the passage of the homestead law, and the further reason that the deed by or through which it was acquired, was not filed for record till after the debt was contracted, it was held that the land was liable to the payment of the debt.

It is, however, said that Diveling fraudulently conveyed the land, and that the proceeding instituted by relator against the grantee, and Sibilla Diveling, administratrix, and widow of Jacob Diveling, deceased, in the circuit court of Schuyler county, and the decree of the court declaring that the conveyance was a fraudulent conveyance, was binding and conclusive upon the defendant, Sibilla, and her children.

The case of *Vogler v. Montgomery et al.*, 54 Mo. 583, settles this point against plaintiff. It was there held that

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a fraudulent conveyance of a homestead on the part of the head of a family will not produce a forfeiture of the benefits of a homestead exemption.

In *Cox v. Wilder*, 2 Dillon C. C. 46, the same view was taken in a homestead arising under our statute. In further support of this view it may be said that the homestead exemption policy has been characterized by the courts as "beneficent," (4 Cal. 23, 26,) "liberal, wise and benevolent," (1 Iowa 441, 512), "humane in its character," (28 Vt. 674). "The leading object of the homestead exemption, is of course to protect the home—a home not for the husband alone, but for him and his wife and children," (6 Iowa 30). "The beneficent provisions of the law are especially designed to guard the wife and children against the neglect, the misfortunes and improvidence of the father and husband," (15 Texas 176); (30 Vt. 759).

Perceiving no error, the judgment is affirmed, the other judges concurring, except Judge HENRY, who does not sit in the case.

AFFIRMED.

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NELSON, *Appellant*, v. FOSTER.

1. **Remarks of Judge in Presence of Jury.** When illegal evidence has been admitted without objection, a remark made by the trial judge in the presence of the jury that if objection had been made he would have excluded it, cannot be assigned for error.
2. **Instructions, HARMLESS ERROR IN.** The Supreme Court will not reverse a judgment for a faulty instruction given by the trial court, when other instructions were given which presented the case to the jury fully and fairly, and upon the facts as clearly proven the verdict was manifestly for the right party.

*Appeal from St. Francois Circuit Court.*—HON. LOUIS F. DINNING, Judge.

*Abner Green* for appellant.



The court below committed error in directing the jury orally, that they could disregard the evidence which had been admitted without objection, in relation to defendant's character; also in giving the third instruction for defendant.

*Clardy & Thomas* for respondent.

HENRY, J.—Plaintiff, appellant, sued the defendant for damages for an assault and battery. The verdict was for defendant, and from the judgment thereon plaintiff appeals. The plaintiff, as a witness, in his testimony, threw all the blame of the conflict upon defendant, but the weight of evidence was to the effect that plaintiff first assaulted defendant with a cane, choked him, and had him down on the floor in a saloon, when his finger was severely bitten by defendant. The only attempted corroboration of plaintiff's version of the difficulty, and it amounted to no corroboration, was the testimony of St. Clair, who said that he heard defendant say that in a fight with plaintiff he had bitten his finger, and was d—d sorry he did not bite it off, and that on another occasion he heard defendant say, speaking of plaintiff having gone to get the finger amputated, "he wished to God that he would have to have his hand cut off." The testimony of defendant, in which he was corroborated by two or three witnesses, who saw the fight, was that plaintiff, with a cane, assaulted defendant, choked him, pushed him down and fell upon him, and that while plaintiff was attempting to gouge him in the face, his finger was bitten. The court, no objections being made to it, admitted evidence to prove that defendant was a quarrelsome, fighting character.

Defendant offered to prove that plaintiff bore the same character, and on objection, the court refused to admit the evidence, remarking that he admitted the evidence of defendant's character because no objection was made to it, and that he would have excluded it if defendant had objected.

I. REMARKS OF  
JUDGE IN PRESENCE  
OF JURY.

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This remark of the court is assigned as error. It does not appear in the bill of exceptions, but no doubt the defendant's counsel, when he offered evidence of plaintiff's character, called the court's attention to the admission of evidence of defendant's character, and the remarks of the court were in answer to that suggestion. Whether so or not, the evidence of defendant's character was inadmissible, and the court might have directed the jury to disregard it. Greenl. Ev., Vol. 1, 79.

The instructions to the jury were as favorable to plaintiff as the law would have warranted. They were told that if defendant assaulted and bit plaintiff's finger, they should find for plaintiff, and give him exemplary damages, and that the amount within the amount claimed in the petition was for them to determine from all the circumstances in evidence; and further, that if they found that defendant bit plaintiff's finger, and that it was unnecessary for him to do so in order to defend himself against the attack of plaintiff, they should find for plaintiff, and assess such damages as would compensate plaintiff for expenses incurred in curing himself, for loss of time and smart money, &c.

For the defendant, the court instructed: that if plaintiff first assaulted defendant, and the injury inflicted upon plaintiff was inflicted by defendant in defending himself against such assault, and in the necessary defense of his person, the verdict should be for defendant, unless he used greater force than was necessary in his self-defense.

The other instructions for defendant, except the third, were substantially the same as the first, and the third is objected to by the plaintiff, because he says, "it is a comment upon the evidence and an argument to the jury; it selects defendant's theory of the case to the exclusion of plaintiff's, and on that theory instructs the jury." It first defines, and properly, an assault, and then instructs the jury that if they believed that plaintiff raised his cane, in a threatening manner, within striking distance of defend-

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ant, that defendant caught the cane, and in a scuffle was pushed or thrown down by plaintiff, that plaintiff got on defendant, and that while in that position, and in order to defend himself against violence, which he had reasonable cause to believe plaintiff was about to inflict upon him, he bit plaintiff's finger, doing no more than was necessary to get rid of plaintiff, the jury should find for defendant.

The instruction is faulty, and it was wholly unnecessary to give it because the case had been fully and fairly presented to the jury in the other instructions; and such an instruction, in most of the cases which come here, would justify a reversal of the judgment, but here it could not have prejudiced the plaintiff. The evidence clearly proved him the aggressor. The instructions in his behalf were all that he could have asked, and those for the defendant required him to show, as a justification, not only that plaintiff was the aggressor, but that he did not use more violence than was necessary to defend himself against the plaintiff's assault. If the evidence left any doubt that plaintiff first assailed the defendant, the judgment should be reversed for the error in giving the third instruction, but it is so manifestly a case in which plaintiff commenced the fight, and, contrary to his expectation, getting the worst of it, seeks to recover damages for the injuries he received, that a reversal of the judgment would do him no good, for on the evidence and instructions omitting the third, the jury, we are satisfied, would not and should not have hesitated to find the same verdict.

It is not every error for which a judgment will be reversed, and when it is palpable that the error did not materially affect the rights of the appellant, this court is not at liberty to reverse the judgment. Wag. Stat., Sec. 33, page 1067. All concur, except NORTON, J., absent.

**AFFIRMED.**

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The State ex rel. Baird v. Holladay.

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(THE STATE *ex rel.* BAIRD V. HOLLADAY, *State Auditor.*

1. **Construction of Constitutions.** In general, constitutions, like statutes, are to be construed as prospective only, but when a contrary intent is plainly apparent from the words employed, a different construction will prevail.
2. **Normal School Appropriations:** ESTOPPEL: SEC. 19, ART. 10, CONSTITUTION OF 1875, abrogated the continuing appropriations for the State Normal Schools made by the act of 1875, (Sess. Acts, p. 78). In January, 1877, without any law authorizing it, the Normal School at Kirksville, drew from the State treasury \$5,000, the amount to which it had been entitled under the act of 1875. In the following April the Legislature appropriated \$7,500 for the school, for the fiscal year 1877. In mandamus proceedings by the Treasurer of the school to compel the State Auditor to draw a warrant on the State Treasury for the full amount appropriated by the latter act; *Held*, 1st, That the relator was estopped to deny the legality of the payment made to him in January; 2nd, That that payment was to be applied upon the appropriation for the year, and the relator was entitled only to a warrant for \$2,500.

*Petition for Mandamus.*

*John F. Williams and Jas. Ellison* for relator.

A payment made on a illegal demand cannot be afterwards applied to a legal demand. *Treadwell v. Moore*, 34 Me. 115. Respondent's return does not allege that the \$5,000 paid January 1st, 1877, was paid on the appropriation of April 6th, 1877, but says that by reason of that payment he will rebate from the appropriation of April 6th. The Legislature on April 6th, 1877, set apart \$7,500, then in the treasury, or to be in it, for the Normal School. That appropriation certainly did not appropriate out of money that had been paid out three months before. An appropriation is the setting apart of a specific amount for a specific purpose.

*Thomas Holladay pro se.*

The appropriation act of April, 1877, was made for

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the fiscal year of 1877, commencing 1st January and ending December 31st, 1877, and hence it relates back to January 1st, 1877, and although the warrant for the \$5,000 was drawn in January for the first six months of the year on the proper requisition and demand of the officers of said Normal District, it must go as a credit on said appropriation, and the relator, inasmuch as he got the money and used it for said Normal School, is estopped from gainsaying the transaction on the ground of irregularity, or otherwise.

SHERWOOD, C. J.—The object sought to be accomplished by the present writ is to compel respondent to pay to relator, as treasurer of the Normal School at Kirksville, certain money, alleged to be due under appropriations made by the Legislature.

The demurrer to the Auditor's return, admits the truth thereof. It is admitted thereby, that under the act of April 6th, 1877, the relator is entitled to the sum of \$7,500, for the year 1877; that under the act of March, 1873, relator was authorized to present to respondent, every six months, (January and July,) his claim for \$5,000, and receive a warrant therefor; but the last named act was abrogated by the adoption of the new Constitution, November 30th, 1875; that relator did, in January, 1877, present to respondent his claim for \$5,000, which was duly audited, and a warrant therefor issued; that there then remained still due to relator, for the fiscal year 1877, under the act of April 6th of that year, the sum of \$2,500; that since the passage of that act, relator had made a demand of \$3,750, which respondent refused to audit, because, with the \$5,000 previously paid, the sum demanded would exceed the amount due relator under the act of 1877, in the sum of \$1,250. Respondent concludes by averring his willingness to draw his warrant in favor of relator for \$2,500, being the balance due under the act of April, 1877.

In the case of the *St. Joseph Board of Public Schools v.*



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*Patten et al.*, (62 Mo. 444,) we had under discussion, the effect produced by the new Constitution in respect to two acts of the Legislature, one of date March 3rd, 1866, the other March 20th, 1872, requiring the county court of Buchanan county, upon annual estimates furnished by that board, to levy a tax, not exceeding seven mills on the dollar, to meet such estimates. The county court being furnished with such estimates for 1876, refused to obey the legislative mandate, and levy a tax as high as seven mills, but levied one for four mills only, and we upheld that court in its action, and refused to compel a tax-levy to the extent claimed by the relator, and allowed by the statute; holding that the present constitution having gone into effect on the 30th of the preceding November, became, so far as concerned the point then under discussion, immediately and not prospectively, operative; needed no legislation in its aid; extinguished the legislative limit and measure of taxation, and substituted in lieu thereof, that ordained by the organic law. And this ruling was made, notwithstanding it was strenuously insisted that as there was a proviso which allowed the constitutional rate of taxation to be increased, which could not be accomplished but by subsequent legislation, that, therefore, both restriction against, and proviso for, an increased rate, had alike to invoke and to await subsequent ancillary legislation.

To such argument this court replied that the effect thereof would be to make the constitutional provision there mentioned, as well as others, "mere abstractions, mere declarations of opinion of the convention which framed the constitution, \* \* \* effecting no constitutional barriers against legislative extravagance, or constitutional assurances of retrenchment in public expenditures, and taxation consequent thereon;" and that "any construction which makes these constitutional restrictions dependent on legislative action destroys their vitality," and renders them "lifeless." That case affords a very marked instance of an organic law, not operating on the future alone; not being

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merely of prospective operation, but springing into efficient being on the instant of its adoption, overturning and hurling from its pathway, every antecedent inconsistent statute. Unless it can be successfully shown that the rule asserted in the Patten case rests upon a different foundation than that presented by the facts in this one; unless, in short, it can be distinctly demonstrated that the constitution makers intended that instrument to be effective, self-executive, and immediately operative as to funds to be raised for school board purposes, but dormant, inert, powerless and lifeless, as to matters of antecedent appropriations; unless, I say, this can be done, then, while the Patten case stands for law, this one must stand with it. And it would not be uninteresting to witness the ingenuity capable to trace, between the two cases, the line of demarcation, and the singular acuteness which could afford a reason for the fine-spun distinction.

In the case of *The State ex rel. v. Macon County Court*, (41 Mo. 453,) to which attention has been called, although it was held that in general, constitutions, like statutes, were to be construed as prospective only, yet it was freely conceded that this rule was not universal in its application; but that when a contrary intent was plainly apparent, from the words employed, a different construction should prevail. And this canon of construction is conspicuously consonant to common sense and sound reason; any other doctrine would place an absolute interdict upon the framers of organic law, by precluding them from the immediate abrogation of existing abuses or the immediate establishment of necessary reforms; would leave the correction of such abuses, or the creation of such reforms to the tardy processes of slow-paced, incompetent, and very often hostile legislation. And we regard the language employed in section 19 of article 10 of the constitution, that "no moneys shall ever be paid out of the treasury of this State,

\* \* \* except in pursuance of an appropriation by law; nor unless such payment shall be made, or a war

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rant shall have issued therefor, within two years after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix the sum or object," as plainly evincive of intention, by the members of the convention, to have that section become operative at once. This was the view we entertained of the matter in the case of *The State, &c. v. The State Auditor*, (64 Mo. 526,) a conclusion reached after full discussion.

But in addition to reasons therein set forth, there have occurred the following: It is obvious that the section above cited refers to two classes of appropriation acts; a law making new appropriation; a law continuing or reviving an old one. Now, if it be true that the section under consideration, is to operate but prospectively, it is plain to be seen, that since it cannot affect anterior appropriations; and since it is equally plain that future acts of that sort, have a constitutional lease of life, for but two years, (when new appropriations must occur), it seems quite evident that the words, "continuing or reviving an appropriation," would be devoid of meaning. If, on the other hand, we construe the section as operating not only as to future, but also as to current appropriations, no obstacle obstructs the plain pathway of construction; for then, we apply the words, "new appropriation" prospectively, and the words, "continuing or reviving an appropriation," to those acts found in being by the constitution on its adoption, and which the framers of that instrument were evidently desirous of reducing to the same fundamental and uniform standard, as that confessedly applicable to subsequently enacted acts of appropriation.

And, it is evident to even casual observation, that the framers of the present constitution designed to imbed therein, as the central and controlling idea, the frugal administration of the financial resources of the State. Tak-

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ing this obviously correct view of their design, it is inconceivable that they would so sedulously guard the treasury against future extravagance, and yet leave open the flood gates of former reckless expenditure; leave to be corrected by future, temporary and optional legislation, evils imperiously demanding permanent and fundamental correction. Such a construction, would, indeed render the clause in question, "lifeless," for, if current appropriations were not embraced by the constitution, then they would (unless meeting with legislative repeal) be perpetual.

We cannot believe that matters so necessary to the financial welfare of the State, so essential to the harmonious operation of the organic law, would be left by the makers of that law, dependent on the uncertainties incident to future legislation. The same view as here expressed was taken by us as to another clause of the constitution, accomplishing the immediate repeal of a repugnant statute, in *ex parte Snyder*, (64 Mo. 58). There is no warrant for the assertion that there is a "striking resemblance" between the 1st section of the schedule and section 3 of Art. 11, of the old constitution; for there is no provision in the latter section, as in the former, that "the provisions of all laws which are inconsistent with this constitution, shall cease upon its adoption."

Again, the Legislature, by section 18 of the general appropriation act of April, 1877, already referred to, repealed all annual appropriations. This would clearly cut off any right which relator might, in any event, possess under any former appropriation act. It is not our province to pass upon matters of mere moral right; but if legislative attention should be called to the matter, the Legislature might, perhaps, feel morally impelled to save those harmless, who, on the faith of former appropriations, have incurred personal responsibilities.

It is claimed by relator that as the act of April 6th, 1877, set apart \$7,500 as an appropriation in favor of rela-

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tor, the payment of \$5,000 by respondent in the preceding January, was without authority of law, and therefore, relator may compel the payment of the whole \$7,500; and, in support of this assumption, we are cited to *Treadwell v. Moore*, (34 Me. 115) where it is held that if a creditor holds two demands, one legal and the other illegal, against his debtor, and the latter makes a payment without designation as to which debt it shall be applied, then, the creditor may appropriate the payment to the illegal demand. But here, the relator does not occupy the attitude of creditor, nor the respondent, or the State, that of debtor. This is proven by the fact that the Legislature may at any time repeal the appropriation. The fiscal year commences with the month of January of each year. It was conceded in argument that it has been the custom to anticipate appropriations, by drawing warrants in the beginning of the fiscal year, and to treat appropriations subsequently made by the Legislature for the purpose for which the warrants were drawn, as covering the whole period of the fiscal year. Whether this practice, which it seems has prevailed for a long period unquestioned, is strictly regular, we need not determine; but we do determine that it does not lie in the mouth of relator, after receiving beforehand the \$5,000, to now impeach and hold for naught that payment. He is only entitled to the sum which the Auditor offers to pay him, and we shall deny the peremptory writ. All concur.

PEREMPTORY WRIT DENIED.

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DYER *et al.*, *Plaintiffs in Error*, v. BRANNOCK *et al.*

1. **What Constitutes a valid Marriage.** An agreement made in 1819 or in 1830, between parties competent to contract, that they would live together as man and wife, followed by actual cohabitation, constituted a valid marriage, without solemnization before a minister of the gospel or an officer of the law. The Territorial Laws of April 24th, 1805 and July 9th, 1806, (Terr. Laws, pp. 68, 83), and the



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act of the Legislature of January 4th, 1825, (Rev. Stat., 1825, p. 527), concerning marriage, contain no positive declaration that a marriage not so solemnized shall be void.

2. **Unlawful Marriage:** INHERITABLE CAPACITY OF ISSUE. Under section 8 p. 328, Rev. Stat. 1825, which provides that the issue of all marriages deemed null in law \* \* shall, nevertheless, be legitimate, a child of such a marriage will inherit and transmit by descent the same as if born of a lawful marriage.
3. **Statute of Limitations.** As against the heir of a married woman whose husband survives her and is entitled to an estate in her lands as tenant by the courtesy, the statute of limitation runs from the expiration of his estate and not from her death.

*Error to St. Louis Court of Appeals.*

The case is reported in 2 Mo. App., 432. Ejectment to recover several lots in the city of St. Louis. The opinion states the case.

*Pope and Randall* for plaintiff in error.

1. There was a marriage between Wilson and Sarah Ann Adams in 1824, unless the evidence proves a marriage between Wilson and Jane Collins in 1819. If the latter marriage is proved, then the former is "deemed null in law," but under the statute the issue is nevertheless legitimate. *Lincecum v. Lincecum*, 3 Mo. 441; *Stones v. Keeling*, 5 Call 143; *Graham v. Bennett*, 2 Cal. 506; *Johnson v. Johnson*, 30 Mo. 72; *Buchanan v. Harvey*, 35 Mo. 276.

2. Though the evidence may not prove a marriage in 1819 between Wilson and Jane Collins, yet there is proof of a marriage between them in 1830, which was valid though not solemnized according to the statute. *Burns' Ecc. Law*, title marriage, 488; *Morris v. Miller*, 1 Wm. Bl. 632; 4 Burr. 2057; *St. Devereux v. Much Dew Church*, 1 Wm. Bl. 367; *State v. Britton*, 4 McCord 256; *Jackson v. Winne*, 7 Wend. 47; *Fenton v. Reed*, 4 Johns. 52; *Taylor v. Robinson*, 29 Me. 323; 2 Greenl. Ev. §§ 460, 462; 2 Stark. Ev. 939; 1 Phil. Ev. (4 Am. Ed.) 631; *Richard v. Brehm*, 73 Penn. St. 140; *Bissell v. Bissell*, 55 Barb. 325; *Clayton*

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v. Wardell, 4 N. Y. 230; *Boatman v. Curry*, 25 Mo. 433; *Grotgen v. Grotgen*, 3 Bradf. 373; *Tumalty v. Tumalty*, Ib. 369; 2 Dane's Abridg. 297; *Cargile v. Wood*, 63 Mo. 501.

3. A marriage in Missouri in 1830 was valid if had by the mutual present consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists. *Dalrymple v. Dalrymple*, 2 Hagg. Con. 61; 1 Bl. Com. 433, 440, note 26; Taylor on Civil Law, p. 301. *et seq.*; 2 Dane's Abr. 290, 297; *Read v. Passer*, 1 Esp. 213; *Leader v. Barry*, Id. 353; *Lindo v. Belisario*, 1 Hagg. Con. 216, 230; *Hayden v. Gould*, 1 Salk. 119; *McAdam v. Walker*, 1 Dow 148, 181, *et seq.*; *King v. Brampton*, 10 East. 282; *Bunting v. Lepingwell*, 4 Coke 29; *Holt v. Ward*, 2 Strange 937; Burns' Ecc. Law, title marriage 457; *Queen v. Millis*, 10 Cl. & F. 534, 703, 785; *Latour v. Teesdale*, 8 Taunt. 837; *Scrimshire v. Scrimshire*, 2 Hagg. Con. 395; *Fenton v. Reed*, 4 Johns. 52; *Nathan's Case*, 2 Brewst. (Penn.) 149; *Ferrie v. DuLux*, 3 Bradf. 151; *Cheseldine v. Brewer*, 1 H. & McH. 152; *Carijolle v. Ferrie*, 26 Barb. 177; *Van Tuyl v. Van Tuyl*, 57 Barb. 235.

4. The doctrine has become established that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity*. Bishop on M. & D., 1 Vol., § 283; 2 Greenl. Ev., §§ 460, 462; *Ferrie v. DuLux*, 3 Bradf. 151; Reeves' Dom. Rel., 196, 200, 290; 2 Kent's Com., 90; *Pearson v. Howey*, 11 N. J. 12, 19; *Londonderry v. Chester*, 2 N. H. 268; *Rodebaugh v. Sanks*, 2 Watts (Penn.) 9; *Parton v. Hervey*, 1 Gray 119; *Milford v. Worcester* 7 Mass. 48, 55; *Carmichael v. State*, 12 Ohio St. 553; *Physick's Estate*, 4 Am. Law Reg. (N. S.) 418; *Senser v. Bower*, 1 Penn. 432, 450; *Cargile v. Wood*, 63 Mo. 501.

5. There is not, and never has been, a statutory provision in Missouri, making void a marriage not conforming to the statutory provision for solemnizing marriages.

6. The plaintiffs were precluded by the life estate from an immediate right of entry or right of action, and their rights did not accrue to them, and the statute did not run against them, until the termination of this estate. It was suspended as to them during the existence of the life estate. Angell on Lim., (5 Ed.) § 483, p. 483; *Carr v. Dings*, 54 Mo. 95; *Salmon v. Davis*, 29 Mo. 176; *Marple v. Meyers*, 12 Penn. St. 122; *Clark v. Vaughan*, 3 Conn. 191; *Heath v. White*, 5 Conn. 228; *Jackson v. Schoonmaker*, 4 Johns. 390; *Jackson v. Sellick*, 8 Johns. 262; *Jackson v. Johnson*, 5 Cowen 74; *McCorry v. King*, 3 Humph. 267; *Guion v. Anderson*, 8 Humph. 298, 324; *Miller v. Ewing*, 6 Cush. 34; *Tilson v. Thompson*, 10 Pick. 359; *Wells v. Price*, 9 Mass. 508.

*Cline Jamison & Day* for respondents.

1. It is not contended that any marriage was ever solemnized between Collins and Wilson at any time, as required by statute laws in force during the times they lived and cohabited together. They were both of the age of consent; they claimed to have contracted and cohabited together during life; but the testimony of Collins herself furnishes positive proof that no ceremony of any kind, as required by law, was ever had between them, so that this cannot be inferred or presumed to have been a marriage as a matter of inferential proof from the way they treated each other or their child, Cynthia Elizabeth, who is claimed to be the offspring of this commerce.

This marriage is neither a legal marriage, nor is it a marriage "deemed null in law." It is simply no marriage at all, nor do we see how it can be claimed that its offspring can inherit the lands of Wilson, the father, if he had any at the time of his death. Our claim is, that this pretended marriage is either a good and valid marriage, or it is no marriage at all; if good and valid, then it could only be dissolved by death or divorce. If it be no marriage,

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then it cannot be a marriage "deemed null in the law," as that phrase in the statute has a legal signification, and comprehends that class of marriages duly solemnized in accordance with the requirements of the law; but, owing to some defect, disability, or deceit of one or both of the parties to the contract, the law deems the marriage null and void, but respects the innocent issue as legitimate. This law was designed to protect the issue of bigamous and polygamous marriages, or marriages that may have been solemnized between parties disabled by law from marrying each other. It is plain the Legislature has never gone so far as to permit parties to enter into the married relation in this State without complying with the law of ceremonies. Nor have our courts ever undertaken to legitimize the product of illicit commerce of the sexes, no matter how able or willing they were to contract marriage with each other, unless that contract was entered into under the forms required by the statute. Under this view, Wilson and Collins were not married. Their connection with each other was illicit. The offspring was a bastard. There was no marriage, and they were liable to a criminal prosecution under the statutes in force at the time.

2. If it be held that marriage could be entered into without solemnization, then the plaintiffs have no title to the land, as this doctrine necessarily conveys with it the need of a judicial divorce to absolve Wilson from this marriage before he would be capable of entering into a lawful marriage with Sarah Ann Adams, and the issue of that cohabitation would be rendered incapable of transmitting an inheritance to its bigamous father. In this case the child of Wilson and Adams could inherit from both parents, but neither parent could inherit from the bigamous child. *Guardians of the Poor v. Nathans*, 2 Brewer (Pa.) 149.

3. This action is barred by the statute of limitations, because more than three years elapsed after the death of

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Cynthia Elizabeth Dyer before this suit was begun. Wag. Stat., § 4, p. 916; *Smith v. Burtis*, 9 Johns. 181; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Doe, etc. v. Jesson*, 6 East 80; *Bush v. Bradley*, 4 Day 298; *Bunce v. Wolcot*, 2 Conn. 27; *Doe v. Jones* 4 T. R. 300; *Stowell v. Zouch*, Plowd. 353.

NAPTON, J.—The two principal questions involved in this case, are: First, whether the observance of the statutory forms prescribed for the celebration or solemnization of marriages, under our territorial government in 1819, or subsequently under the State government in 1830, was essential to a valid marriage; and second, the construction of our statutes of limitation, as applied to the facts in evidence.

In order to show the pertinency of the instructions to the evidence submitted, we will here state the main facts which that evidence tended to establish; whether to the satisfaction of the jury or not, it is not important to inquire.

The land in controversy is a part of the Motard tract, which passed at an early date to Culver Adams, and through him to his three children, David, James and Sarah Ann Adams, and upon a partition in 1838, the one-third which had belonged to Sarah Ann was set apart to the unknown heirs of Zachariah Wilson, from whom the plaintiff claim.

Zachariah Wilson was a river pilot in 1819, and one Mrs. Collins, a widow, at that time kept a boarding house in St. Louis. There was evidence to show that Wilson and Jane Collins, the daughter of Mrs. Collins, and then about 19 years old, on the 24th August, 1819, about 10 o'clock at night, declared their intention, in the presence of the mother and brothers of Jane, and several boarders who were present, to live together as husband and wife. There was no magistrate or other person authorized by the statutes of the Territory to celebrate marriage rites present on the occasion, but they stood up on the floor of the sitting room, or most public room in the house, side by



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side, with joined hands, and it was announced to those present by the mother or brother of Jane, that she and Wilson had agreed to marry, to which they both assented by an inclination of the head. They then retired to a bedroom and cohabited together as man and wife for three weeks. When Major Long reached St. Louis on his expedition to the Rocky Mountain, Wilson joined the expedition. The result of this cohabitation was a daughter named Cynthia Elizabeth, from whom plaintiff's title is derived.

It was understood, on the departure of Wilson, that Mrs. Collins should take care of Jane, and that he would, when opportunity presented, remit some money to support her during his absence, which he occasionally did. Meanwhile, Mrs. Collins and her family removed to St. Charles and were living there when Wilson returned to St. Louis in 1824. He was then married, in accordance with the forms provided for by the statute then in force, to Sarah Ann Adams, the owner of the property now in controversy. By this marriage a female child was born in 1826, who survived the mother, and died in 1827.

In 1830, after the death of Sarah Ann and her child, Wilson sent for Jane Collins, who was then in St. Charles, and he and Jane Collins afterwards lived together as man and wife, until his death in 1836, recognizing her as his wife and treating the daughter, Cynthia Elizabeth, as his child. After the death of Wilson, Cynthia Elizabeth married Abner W. Dyer, and the plaintiffs are the descendants of that marriage. Mrs. Dyer died July 13th, 1869, and her husband died June 25th, 1870. This ejectment was brought August 11th, 1872.

The instructions of the court to the jury in regard to these connections of Wilson, were as follows: "If you find from the evidence that in the year 1819, at the town of St. Louis, intending thereby to contract marriage, the said Wilson and one Jane Collins, agreed to live together thenceforward as man and wife, and that of the union thus

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formed, Cynthia Elizabeth Wilson was born, and that she survived the said Wilson, then the title to the premises sued for became vested in said Cynthia, &c. But if you believe from the evidence that when they came together in 1819 the said Wilson and the said Jane did not intend to contract marriage, but merely intended to live together for purposes of illicit cohabitation, and of that intercourse said Cynthia was born, then upon the death of her father she did not become vested with the title to the premises sued for, unless you find from the evidence that subsequently to the birth of said Cynthia, and after the death of said Sarah Ann Adams, he (Wilson) and the said Jane Collins, intending thereby to intermarry, mutually agreed to live together thenceforward as man and wife, and did so live, and that after such reunion, the said Wilson recognized the said Cynthia as his child."

The statutes in regard to marriages, in force from 1819 to 1830, are as follows. The first act was passed by the Governor and Judges of Indiana Territory, on April 24th, 1805. So much of it as is important to the consideration of the question involved here, is in these words:

"1. All male persons of the age of seventeen years, and female persons of the age of fourteen years, and not prohibited by the laws of God, may be joined in marriage.

"2. It shall be lawful for any of the judges of the General Court or the County Court of Common Pleas, in their respective districts, ministers of any religious society or congregation within the district in which they are settled, and the society of Christians called Quakers, in their public meetings, to join together as husband and wife, all persons of the above description who may apply to them agreeably to the rules and usages of their respective societies to which the parties belong.

"3. Previously to persons being joined in marriage as aforesaid, the intention of the parties shall be made known by publishing the same for the space of fifteen days at least, either by the same being openly declared three

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several Sundays, holy days, or other days of public worship in the meeting, in the town where the parties respectively belong, or by publication in writing under the hand and seal of one of the judges before mentioned, or of a justice of the peace, within the district, to be affixed in some public place of the town where the parties respectively dwell, or a license shall be obtained of the Governor under his hand and seal, authorizing the marriage of the parties without publication, as in this law before required."

An additional act was passed by the Legislature of the Territory of Indiana, approved July 9, 1806, which in no way repeals or limits the foregoing law, except that the third section is as follows:

"Sec. 3. From and after the passage of this act, it shall be lawful for any preacher of the gospel, magistrate, or regularly ordained clergyman, to perform the ceremony of marriage within the territory, to be certified and recorded, &c."

This remained the law of marriage in the territory until after the admission of Missouri into the Union, and until the first revision of 1825, when it was repealed, and a different regulation adopted and approved on the 4th day of January, 1825, and to take effect on the 4th day of July, 1825. Revised Statutes of 1825, p. 527.

By the first section it is provided as follows: "Be it enacted by the General Assembly of the State of Missouri, That every judge and justice of the peace of this State, and every stated and ordained minister and preacher of the gospel, shall be, and is authorized and empowered to perform the ceremony of marriage within this State, and all marriages heretofore solemnized by any of the said persons shall be deemed good and valid."

The remainder of the act provides for the mode of recording marriages, and creates the usual penalties for solemnizing marriage of infants, without consent of parents, &c. This law remained in force until the revision

of 1835, when it was somewhat modified, and the act was commenced by the following section :

"1. Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting, is essential."

The first question presented by these instructions of the circuit court on the trial, was decided by this court in the case of *Cargile et al. v. Wood et al.*, (63 Mo. 501.) In that case the following instructions were given by the circuit court: "The jury are instructed that marriage is a civil contract, and it is not necessary that the same shall be solemnized before a minister of the gospel, or an officer of law, and if you believe from the evidence, that at any time prior to the birth of the child Cynthia, Cargile and Cynthia Kilgore consented and agreed with each other to be husband and wife, and cohabited together as such husband and wife, then such facts constitute a lawful marriage, even though they or either of them supposed or believed that a solemnization before a minister or officer of the law was necessary to comply with the forms of the law, and no subsequent acts or declarations by them or either of them could in any wise annul such marriage; and although the jury may believe from the evidence that Augustus Cargile and Cynthia Kilgore had first become intimate in the State of Georgia, and although they were not then married to each other when such intimacy occurred, still if you believe from all the evidence in this case that said Augustus Cargile brought said Cynthia out to Missouri, on or about 1854, and that subsequently they cohabited together here as man and wife, and during such cohabitation treated each other as man and wife and were so reputed, had children which they treated as father and mother, and held them to be their children, that they thus lived and cohabited together until their death in 1862, and at such death had the child Catherine, then living and about 8 or 12 months old, then the law presumes, and you have a right to infer that there had been a lawful

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marriage between them prior to the birth of said child, Catherine."

In the instructions given by the court, it is again asserted; "You are instructed that marriage is a civil contract, and in order to constitute a lawful marriage it is not necessary that the ceremony of marriage shall have been performed by a minister of the gospel or an officer authorized by law to perform such ceremony."

It will be perceived that these instructions, which were approved by this court, go further than the question involved in the present case requires to be considered, but the basis of all the propositions submitted to the jury was the assumption that under the law of this State a ceremonial marriage was not essential to its validity. Indeed, this proposition was not disputed on either side, and therefore was not discussed in the opinion of the court, but its correctness was essential to an affirmance of the judgment—for there was no pretense or shadow of proof in the case of any ceremonial marriage, at any time, and the marriage which the jury were authorized to presume was simply a marriage *per verba de praesenti*, or *per verba de futuro* followed by cohabitation.

The United States District Court for this State, in the case of *Holabird v. A. M. Insurance Co.*, (12 Am. Law Reg. N. S. 567; S. C. 2 Dill. C. C. 167,) appears to have adopted the same view of the law of this State. Judge Treat, in his instructions to the jury in that case, says: "It is not necessary to the validity of a marriage in Missouri, that any special ceremony, religious or otherwise, should be performed, nor that the marriage should be solemnized before any person belonging to any one of the classes named in the Missouri statute, as authorized to perform the ceremony. Marriage in Missouri may be had by the mutual consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists.



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And such is substantially the law in Tennessee and Illinois. Therefore, if the jury believe from the evidence, that in the State of Missouri, Tennessee or Illinois, the plaintiff and Mr. Holabird agreed, by mutual consent, given in good faith, to become husband and wife, and cohabited as such thereafter, then from the date of such mutual consent, she was his wife."

In view of the importance of this question to the interests of society, and of the fact of a unanimous opinion of the Court of Appeals, directly in opposition to these views, it is proper that we should re-examine the authorities, both English and American, to see if the conclusion heretofore reached was arrived at hastily or inconsiderately.

The common law of England, in a modified form, was adopted by the Territorial Legislature of Missouri in 1816. So also were the statutes of the British Parliament in aid of the same, made prior to the fourth year of James I, provided that neither said common law nor statutes were inconsistent with the laws of this territory or with the constitution and laws of the United States, and were not local to the Kingdom of Great Britain. In England, prior to the Council of Trent, marriage was regarded in no other light than as a civil contract, and the law treated it as it did all other contracts, allowing it to be good and valid in all cases, where the parties at the time of making it, were, in the first place willing to contract, and secondly, able to contract, and lastly, actually did contract. Any contract made *per verba de praesenti*, or in words of the present tense, and in cases of cobabitation *per verba de futuro*, between persons able to contract, were, before the act of George II deemed a valid marriage. (1 Bl. Com., Ch. 15.) In *Jesson v. Collins*, (2 Salk. 438, 447,) Lord Chief Justice Holt says that a contract *per verba de praesenti*, was a marriage, and in the same case, reported in 6 Modern 155, he says that such a contract amounts to an actual marriage, as if it had been *in facie ecclesiae*—and in this, all the court agreed.

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And in the *King v. Inhabitants of Brampton*, (10 East 282,) Lord Ellenborough, C. J., declares that before the marriage act the contract of marriage, *per verba de praesenti*, would have bound the parties.

It is true, that in the *Queen v. Millis*, (10 Clark and Fin. 682), it was maintained by the judges, that from the earliest times, long prior to the Council of Trent, the common law of England required to the constitution of a *full and complete marriage*, some religious solemnity; "that besides the civil contract, that is, the contract *per verba de praesenti*, which has always remained the same, there has at all times, been also a religious ceremony, which has not always remained the same, but has varied from time to time, according to the variations of the laws of the church; with respect to which ceremony, it is to be observed, that whatever at any time has been held by the law of the church to be a sufficient religious ceremony of marriage, the same has, at all times, satisfied the common law of England in that respect."

It is evident that the common law of England, as thus expounded, was not understood to be the common law introduced into this Territory in 1816, but rather as it was declared by Sir Wm. Blackstone, in the extract we have made from his Commentaries, and by Ch. Kent, in his Commentaries (2 Vol., p. 86,) when treating of the same subject: "No peculiar ceremonies," says the author, "are requisite *by the common law* to the valid celebration of the marriage. The consent of the parties is all that is required by natural or public law. The Roman lawyers strongly inculcated the doctrine that the very foundation and essence of the contract consisted in consent, freely given by parties competent to contract. *Nihil proderit signasse tabulas, si mentem matrimonii non fuisse constabit. Nuptias, non concubitus, sed consensus facit.* This is the language equally of the common and canon law, and of common reason. If the contract be made *per verba de praesenti*, and remains without cohabitation, or if made *per verba de futu-*

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ro, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary, and which the parties (being competent as to age, and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiae*.

In Reeves' Domestic Relations, p. 196, it is observed that "there is nothing in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person in holy orders, or that it should be solemnized in a church. Every idea of this kind, entertained by any person, has arisen wholly from the usurpation of the church of Rome on the rights of the civilian. She claimed the absolute control of marriages, on the ground that marriage was a sacrament, and belonged wholly to the management of the clergy. The solemnization of a marriage by a clergyman was a thing never heard of among primitive christians, until Pope Innocent III, ordered it otherwise. The only ceremony in practice among them, was, for the man to go to the house where the woman dwelt, and, in the presence of witnesses, to lead her away to his own house. It is a pure civil transaction, to be solemnized in such a manner as the Legislature shall direct, whether by a clergyman or any other person. \* \* I apprehend that by the provisions of the common law, marriages, although celebrated by a person not qualified by law or in a manner forbidden by law, are valid. The conduct of the parties concerned, has rendered them obnoxious to the penalties of the law; but such singular conduct is not a ground for impeaching the validity of the marriage. Until the civil wars, during the reign of Car. I, nothing can be found on this subject. For until that period, it had not been supposed that any person, but one in holy orders, could celebrate a marriage. The mode of pleading was *per presbyterum in sacris ordinibus constitutum*. After this period, and before the statute of George II, several cases may be found which will cast light on this subject. During the Commonwealth, the power of

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celebrating marriages was given to justices of the peace, and they were the only officers whom the law recognized as possessing authority to marry. Yet, during the existence of this law it was determined that a marriage celebrated by one in holy orders, though not a justice of the peace, was valid. After the Restoration, the power of celebrating marriages was committed exclusively to the clergy of the church of England. And yet we find the Court of King's Bench issuing a prohibition to the spiritual court, because the validity of a marriage had in the face of a separate congregation, was questioned in said court. So, too, we find that a marriage by a preacher in a separate congregation, who was a layman, was recognized as valid; for, on the death of the husband, the wife and children were admitted to their distributive shares. \* \* \* We find, also, that a marriage by a popish priest was held valid; and that, in the strongest possible case; the case was that a man had been married by a popish priest, who, by law, had no authority to marry."

Mr. Greenleaf, in his Treatise on Evidence, Vol. 2, p. 513, says: "Marriage is a civil contract, *jure gentium*, to the validity of which the consent of parties, able to contract, is all that is required by natural or public law. If the contract is made *per verba de praesenti*, though it is not consummated by cohabitation, or if it be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary. And though in most, if not in all the United States, there are statutes regulating the celebration of marriage, and inflicting penalties on all who disobey the regulations, yet it is generally considered that in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner, shall be absolutely void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage regularly made according to the common law, without observ-

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ing the statutory regulations, would still be a valid marriage."

Mr. Bishop, in his Treatise on Marriage and Divorce, declares that "the doctrine has become established that a marriage, good at the common law, is good, notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity. This rule applies not only to the statute as a whole, but to the several parts of it; so that, if it declares the marriage void for non-compliance with a particular provision, it is good notwithstanding a failure to comply with any other provision. This rule, like most other rules now well settled, has struggled against some doubts and uncertainties, but it seems never (unless we except a Massachusetts decision, to which we shall presently refer) to have been discarded in actual adjudication." The exceptional case referred to is, *Milford v. Worcester*, (7 Mass. 48.) Passing from the text-books, we proceed to refer to a few of the leading decisions in this country, referred to by Mr. Bishop, as supporting the position stated in the above quotation.

In the case of *Ferrie v. The Public Administrator*, (3 Bradf. 151) in the Surrogate Court in New York, a case elaborately discussed by eminent counsel, the learned Surrogate declared the following doctrine as the basis of his decision: "Marriage, in its origin, is a contract of natural law, and in civil society is a civil contract, requiring no forms or ceremony, unless imposed by the local law, and hence, when the law directs the ceremony to be conducted in a prescribed manner, a failure to comply with such forms does not affect the validity of the contract, *unless such effect be expressly declared by statute.*" This case was decided in 1855.

In *Dumaresly v. Fishly*, (3 A. K. Marshall 370,) decided in 1821, C. J. Boyle, said: "Marriage is nothing but a contract; and to render it valid, it is only necessary, upon the principles of natural law, that the parties should be able to contract, willing to contract, and should actually



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contract. A marriage thus made, without ceremony, was, according to the simplicity of the ancient common law, deemed valid to all purposes; and such continued to be the law of England until the time of Pope Innocent III, when the ceremony of celebrating marriage *in facie ecclesiae*, was first introduced into that country."

117B Judge Mills dissented in the case—but upon the ground that the common law of England was only adopted in Kentucky so far as it was compatible with the spirit of our government; and that the subjection of the English common law judges to the usurpations of ecclesiastical judicatures induced the doctrine that words alone, without cohabitation, constituted a marriage. Thereupon, Judge Mills says: "I would say that a marriage executed according to the forms of law, should be binding at all events, and that those made in other modes should require consummation, evidenced by cohabitation; while in those that exist in bare words, and which had the offer of consummation on one side and a refusal on the other, I would leave the *locus pœnitentiae* to the party rejected."

In *Hutchins v. Kimmell*, (31 Michigan 127,) decided in 1875, Judge Cooley declares it to be the law of Michigan, that where parties agree presently to take each other for husband and wife, whatever the form of ceremony, or if all ceremony be dispensed with, and from that time live together professedly in that relation, this constitutes a valid marriage. And the judge adds: "This has become the settled doctrine of the American courts; the few cases of dissent, or apparent dissent, being borne down by a great weight of authority in favor of the rule as we have stated it." And the judge cites cases in New York, Pennsylvania, New Jersey, Vermont, Ohio, North Carolina, New Hampshire, Tennessee, Maryland, Alabama, Kentucky, California and Louisiana, in support of this position.

The case of *Londonderry v. Chester*, (2 N. H. 268,) was decided in 1820. In that case, C. J. Woodbury, says: "The

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form of the contract of marriage, as a mere civil transaction, is well enough established. Thus, if it be *per verba in futuro*, the contract is executory, and if not afterwards executed, an action lies for damages alone, though formerly this kind of a contract was specifically enforced by ecclesiastical courts, and its existence was considered a good cause of a divorce. But if the contract be *per verba de praesenti*, the marriage is complete; and if the parties, being in other respects competent to contract, and not being influenced by fraud or force, employ such words, they become, by the operation of the contract alone, husband and wife, and are liable to the duties of their new relation." And Judge Woodbury adds: "Under this view, the purity and sacredness of the marriage contract will remain no less, but rather more inviolate, than under a different construction. For now the contract will never be annulled for any accidental or designed irregularity, not extending to the essential grounds of the contract. And it is a matter of deep concern to the public, that when a contract which changes so thoroughly the relations of the parties to the community, is first executed by them with deliberation and afterwards consummated by cohabitation, it should not be lightly dissolved, and everything done under it annulled."

*Pearson v. Howey*, (6 Halstead N. J. 17,) was decided in 1829. In that case Judge Ford says: "The parties thus joined together were not related within any prohibited degree, nor under any disability for want of age or understanding. They were free, able and willing, as it respected themselves, and they contracted marriage in words of the present tense, taking each other as husband and wife. I consider it to have been long and fully settled in law that such is a valid marriage. It is a maxim of the common law, as ancient as the law itself, that *consensus non concubitus facit nuptias*. It is the contract makes the marriage. Such, also, has always been the law or maxim of the church in all ages, as well as the common law.

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Courts of justice are not authorized to alter the law, without legislative authority in any case, and most assuredly not in the case of such universal importance." Judge Ford proceeds to cite authorities from the ancient English adjudications, and then proceeds: "It was never held essential to the validity of the contract that it should be made in a particular place or in the presence of one person more than another, provided it could be sufficiently proved." \* \* \* "The common law requires nothing more of parties who are under no legal disability, than proof of a contract, made in words of the present time."

\* \* \* "But though the common law requires nothing more than a contract, still the proof of it is indispensably necessary, because if it cannot be proved it is the same as none, and will be treated as none, from whence arises the heavy obligation which parties lie under to themselves of solemnizing it before one or more competent and credible witnesses, such as parents, relations, friends or neighbors. \* \* \* But though the common law requires proof of the contract of marriage, it does not specify who shall be the witnesses, any more than who shall be in case of a will, a deed or a bond. \* \* \*

W. H. was as competent to prove it as a magistrate, a clergyman, or religious society, according to the most established principles of the common law, which the constitution of this State makes the common law of the land, except so far as it may be repealed or altered from time to time by the Legislature. The question then is, whether the Legislature has ever repealed or altered the law of marriage. Now our whole statute book shows but one act concerning marriages, which is to be found in Rev. Laws 181, and it enacts 'that every justice of the peace of this State,' every 'stated and ordained minister of the gospel,' and 'every religious society according to its rules,' shall be empowered to solemnize marriages. This law *does not prohibit other persons* from solemnizing them, as they always had a right to do before the law was enacted.

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It contains no express words of prohibition nor any implication to that effect. To solemnize means nothing more than to be present at a marriage contract, in order that it may have due publication, before a third person or persons, for the sake of notoriety and the certainty of its being made. To solemnize or celebrate means nothing more, and may be done before parents, friends or strangers, able to testify to the fact; but where there is only one witness, who may die at any moment, the parties incur an awful risk of losing the only evidence of the marriage, and thereby of bastardizing their innocent offspring, and of losing the great marital rights of protection and property. But in point of mere legal competency for witnessing or solemnizing a contract of marriage, the law has made no distinction of persons. Thus, justices of the peace, ministers of the gospel, religious societies, not only had the power like all other persons to witness and solemnize marriages, but they actually exercised this power, long before the present act was passed, which proves that they always had the right to do it at common law, and as this act gave them no new power so it took none away. But suppose this act had gone to the whole extent of declaring that no other person or persons should solemnize marriages, except those mentioned in it, such other persons would commit an offense against the act by solemnizing marriages, for which they might be punished, but still the marriage contract between the parties themselves would remain valid. During the Commonwealth of England, Parliament passed a law requiring all marriages to be solemnized by a justice of the peace, yet a marriage solemnized before a clergyman was holden by all their courts to be valid, as between the parties, though the clergyman was punishable. So the solemnization of marriage in England, before a popish priest, was always holden valid, as between the parties, though the statute prohibited such priest from doing it, and for the act he was exposed to punishment. See the cases collected on this subject in Reeves' Dom. Rel., 198. Our

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act empowers an ordained minister of the gospel to solemnize marriages; but suppose a minister of the gospel should do it before he is ordained, can any person believe that the marriage itself would be invalid, and that either of the parties might go away and any time afterwards contract new alliances? Our statute prohibits ministers of the gospel from solemnizing the marriage of persons under age, without the consent of parents or guardians, under a heavy penalty; but this does not render the marriage void; on the contrary, it remains sacred and inviolable, and is the very thing that aggravates the offense. What, then, it may be asked, was the public use of the act in question, if justices of the peace, clergymen and religious societies had power to solemnize marriages as well before the passing of it as since? I answer, that they were the persons who had been resorted to by almost all classes of society, as if by universal custom, to be witnesses of this solemnity, on account of the gravity and respectability of their characters, and one of the uses of this invaluable statute was, to compel them to make a record of all these marriages by certifying them into the clerk's office of the county, there to remain of record to future times, to effect the most public as well as private interests. \* \* The withering effects of declaring a marriage null and void, from the beginning have been sufficient to appall, not courts of justice only, but courts of the church, in all ages, where the parties had taken each other as husband and wife, by words of solemn contract in the present tense, in the presence of credible witness or witnesses, and the contract could be fully proved. The British Parliament have lately repealed their old common law, by prescribing the manner in which marriage shall be solemnized, and adding an express clause that marriage in any other form shall be void, but it is obnoxious to the country, to the wisest and best and most virtuous men among them, as well, it would seem, as to their courts of justice, and it is yet a problem whether they will not connive at the evasion of it."



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It will be observed that the above was the opinion of Judge Ford alone, the other judges not expressing any dissent thereto, but declining to express any opinion, except upon the precise point involved in the case, which was the validity of a marriage solemnized by a justice of the peace, outside of his territorial jurisdiction. But I have copied largely from Judge Ford's opinion, because it is frequently referred to with approbation, not only in text-books, but in subsequent adjudications, as an able discussion of the subject.

The case of *Rodebaugh v. Sanks*, (2 Watts 11), was decided in 1833. C. J. Gibson in that case, observes: "Many provisions in the act of 1700 and 1729, though doubtless wholesome when they were enacted, are ill-adapted to the habits and customs of society as they now exist. It is not too much too say, that a rigid execution of them would bastardize a vast majority of the children which have been born in the State for half a century, for if the clause which requires that 'all marriages' shall be solemnized by taking each other to husband and wife before 'twelve witnesses,' were taken according to its natural import for a declaration of what shall be a legal marriage and what not, it would follow that a marriage contracted in any other form or way, is void. To escape from a conclusion imputative of guilt to the parties and destructive of the civil rights of their offspring, it is necessary to hold not only this clause, but those which require a certificate of marriage under the hands of the parties and the twelve witnesses, to be registered in the proper office, as well as publication of banns by posting on the church or court-house doors, with other matters fallen into disuse, to be but directory."

In 1845, in the Court of Quarter Sessions at Philadelphia (*Nathan's case*, 2 Brewster 149,) Judge Parsons says: "It seems to be clearly settled in the United States, that marriage is but a civil contract, and it is not necessary that a clergyman or magistrate should be present to give validity to the marriage; and if the contract be made *per*

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*verba de praesenti*, and remains without cohabitation, or if made *per verba de futuro*, and is followed by consummation it amounts to a valid marriage, which the parties, being competent as to age and consent, cannot dissolve, and is equally binding as if made *in facie ecclesiae*. The question has been very fully considered by the Supreme Court of this State, and held to be the law here, that marriage is a civil contract, which may be completed by any words in the present tense, without regard to form, nor is it absolutely necessary to be done before a clergyman or a magistrate."

In *Richard v. Brehm*, (23 P. F. Smith 140,) decided by the Supreme Court of Pennsylvania in 1873, Mercur, J., observed: "Marriage is a civil contract, *jure gentium*, to the validity of which the consent of parties, able to contract, is all that is required by natural or public law. If the contract is made *per verba de praesenti*, though it is not consummated by cohabitation, or if it be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary. The fact of marriage may be proved by competent and satisfactory evidence. \* \* Marriage is in law, a civil contract, not requiring any particular form of solemnization before officers of church or State."

The case of *Bissel v. Bissel*, (55 Barb. 326,) was decided in 1869. It is there said: "It is well settled, that no religious ceremony, or form of any description, is essential to the validity of marriage. All that is requisite is, that the parties should be capable of contracting, and that they should actually contract to be husband and wife. A mere agreement to marry at some future time, followed by cohabitation, will not constitute a marriage, but an agreement, made in the present tense, whereby the parties assume towards each other the marital relation, is an actual marriage. This agreement may be written or verbal, with or without witnesses, and may be proved like any

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other contract; when proved to the satisfaction of a court of justice, it constitutes a lawful marriage."

The case of *Newberry v. Brunswick*, (2 Vt. 159), was decided in 1829. Paddock, J., delivered the opinion of the court, a part of which is as follows: "To marry is one of the rights of human nature, instituted in a state of innocence for the protection thereof, and was ordained by the great Lawgiver of the universe, and not to be prohibited by man. Yet human forms and regulations are necessary for the safety and security of the community; but those forms and regulations are to be within the reach of every person wishing to use them; and if they are not, other forms and customs will be substituted; and such was the case in this instance. Before the days of Pope Innocent III, solemnization of marriages in churches was not known. After the agreement to cohabit, the man led the woman to his habitation, which was all the ceremony then in use. \* \* \* It must, however, be admitted, that great convenience is experienced from the celebration of marriages before constituted authorities, for it not only furnishes proof of the best description, but the preservation of it is directed by statute, and easily attained when needed. But the law, treating the marriage agreement of the parties as the marriage, regulating only the manner and form of celebrating it and preserving the evidence thereof, admits proof other than the copy of the registry or record of the magistrate or witnesses—the declaration of the man or woman, the continued understanding of friends, and cohabitation as evidence of the fact—and as neither our statute (nor that of 26 George II) declares that marriage was void which was not consummated according to the provisions of them, no sound reason can be offered why the covenants and agreements of marriage between H. and P. *per verba de praesenti*, followed by cohabitation, should not be deemed as valid, to every intent, as though made before the altar, specially as it is viewed both in this State and in England, in no other light than as a civil contract."

The case of *Holmes v. Holmes*, (6 La. O. S. 463) was decided in 1833. In that case, Judge Bullard says: "Marriage is regarded by our law in no other light than as a civil contract, highly favored and depending essentially on the free consent of the parties capable by law of contracting. Our code does not declare null a marriage not preceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of the marriage. These laws relating to forms and ceremonies, here regarded as directory to those alone who are authorized to celebrate marriages, are intended to guard against hasty and inconsiderate marriages in defiance of parental authority. Like all other contracts, it may be proved by any species of evidence not prohibited by law, which does not pre-suppose a higher species of evidence within the power of the party."

The case of *Campbell's Admr. v. Gullat* (43 Ala. 57,) was decided in 1869. The Alabama statute resembled the Missouri statute, except that it declared positively "that no marriage shall be solemnized without a license issued by the judge of probate of the county where the female resides;" yet the court held in that case as follows: "Such laws do not declare marriages, not solemnized in accordance with their provisions, invalid. We, therefore, do not feel authorized to do what the laws themselves have not done, but we hold that in this State, a marriage not celebrated in conformity with the said laws on marriages, that is, celebrated without a license issued by a judge of probate, or not by any one of the persons or religious societies named in such law, or without complying with other provisions of said law, is not to be declared invalid, provided the requirements of the common law have been substantially complied with; in other words, that a marriage good at the common law is a valid marriage in this State."

In *Hargroves, Admr. v. Thompson*, (31 Miss. 211,) decided in 1856, Hardy, J., observed: "There is nothing in the statutes of Mississippi directly rendering mar-

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riages, conducted without the observance of the rule therein prescribed, illegal and void, and the rule which has been sanctioned in reference to marriages not solemnized according to statutory regulations is, that even prohibitory words in a marriage act will not authorize an inference of the nullity of the marriage, unless the nullity is declared by the act, and although persons who may violate the forms required by the statutes in solemnizing marriages, may be liable to the penalties provided for the non-compliance, yet marriages contracted without a conformity to such regulations are generally held to be valid, if made between parties capable by the common law of contracting them, unless the statutes positively declare that marriages not conducted in conformity with their provisions shall be void. We think this is the proper construction to be given to our statutes on this subject, which appear to be similar in their provisions to the statutes of other States in which this construction has been adopted."

In *Carmichael v. The State*, (12 Ohio St. 553,) it was held that where parties openly and mutually covenanted to a contract of present marriage—then to become husband and wife—and thereafter cohabited as such, it was a legal marriage, and the man was liable to prosecution for bigamy, if he had been married before and his wife was still living.

In *Graham v. Bennet*, (2 Cal. 503,) decided in 1852, the same doctrine is asserted. In Tennessee, (see *Bashaw v. The State*, 1 Yerger 183) the statute required a publication of banns or a license from under the hand and seal of the Governor, and enacted "that all marriages solemnized as aforesaid, without such license first had, *shall be and are hereby declared illegal and void.*" And the court held (Peck, J., dissenting) that a marriage celebrated without a license or without publication of bans, was void. This act was passed in 1766, and before the separation from North Carolina. Hence, the decision in North Carolina in 6 Iredell 23, *State v. Robbins*. So that, as far as I have



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been able to discover, the only decision in the United States conflicting with the general doctrine stated by Mr. Bishop, is the case in 7th Massachusetts Reports heretofore referred to.

These extracts are probably sufficient to show the general current of American authority, and would seem to justify our conclusion, *stare super antiquas vias*. Our statutes are essentially like those of the States from whose courts opinions have been quoted, and in some respects less stringent than many others. There is, at all events, no positive declaration in our statute that a marriage not celebrated or solemnized before a magistrate or minister of the gospel, shall be void. It will not be understood that we assent to all the positions assumed by those judges and writers from whom we have quoted; we merely conclude from these authorities, as well as upon general principles and public policy, that the instructions of the circuit judge were correct. Nothing is said in these instructions as to the efficacy of a promise to marry at some future time; nothing is declared as to the value of a promise *in verba de praesenti*, unless followed by cohabitation, and unless the parties intended a present marriage. If an affirmative response was given by the jury to the question propounded by the court, there was a contract of present marriage—openly made before the mother and brothers of the woman, and several strangers to the family—followed by cohabitation as husband and wife. That the husband, in pursuing his avocation, determined to join Major Long's exploration party to the Rocky Mountains, could hardly be regarded as a very strong proof of predetermined bad faith, nor his subsequent marriage, five years afterwards. These were matters, however, for the jury to pass on. The jury were required to find that the parties contemplated no further ceremony to completely constitute the conjugal relation between them, and that they, at the time they stood up with joined hands, on the floor of Mrs.

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Collins' boarding house, intended to become and believed that they had become husband and wife.

We will not be understood as giving any opinion in regard to a contract of marriage *in verba de futuro*, followed by cohabitation, since the facts in the present case require none on that question. (10 Ohio St. 181).

Assuming the marriage of 1819 to have been valid, or that in the event that the jury found it invalid, under the instruction, and that of 1830 to have been valid, the only remaining question connected with this branch of the subject, is the propriety of the declaration by the court that in either event, the father (Wilson) could inherit from his child by Sarah Ann Adams.

Prior to the act of January 11th, 1822, (Ter. L., p. 857), our statutes of Descents and Distributions had been very complicated, and were filled with detailed provisions aiming to keep the estate in the blood of the first purchaser. This act abandoned all provisions of that character, was very simple, and, in fact, substantially our present law. It provided also that the issue of all marriages, deemed null in law or dissolved by divorce, should, nevertheless, be legitimate. All the statutes concerning divorce and alimony, from 1807 down to this time, (1822,) and subsequently to 1825, had made the same declaration in regard to divorces, namely, that divorces should not affect the legitimacy of the issue. In 1825, however, a singular clause was inserted at the end of the section providing for divorces, and declaring the issue legitimate, "except in cases where the marriage shall be declared null and void from the beginning, on the ground of prior marriage." How to reconcile this exception with the provision in the act concerning descent and distributions, that the issue of marriages deemed null in law, should, nevertheless, be legitimate, was a problem presented to this court in 1834, in the case of *Lincecum v. Lincecum*, (3 Mo. 441). The court, however, without undertaking to explain its object, which

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would have been a difficult task, decided that at all events it did not repeal or modify the contrary provision in the act of descents and distributions. And the Legislature, in the fall of that year, (Revising Session of 1834-35,) evidently agreeing with the construction of the court, and seeing the folly of the proviso, struck it out of the act of 1834-5, and it has so remained ever since.

The second marriage of Wilson being null in law (on the assumption that the marriage of 1819 was valid) the child of that marriage, beyond doubt, inherited the estate in controversy, from her mother, and if she had been a legitimate child, not only *de jure* but *de facto*, would unquestionably, on her death, without issue and without brothers or sisters, have transmitted the estate to the father. It is, however, contended that the legitimacy thus imparted to the child by law, whilst it would enable her to take either from her mother or father, and to transmit the inheritance to descendants, must be so restricted as not to allow her to transmit the estate to ascendants, especially not to the guilty father. No such restriction is found in the law. The act simply declares the child legitimate, and the same act provides for the transmission of the estate on specified contingencies, from the child to the father. It is in the act regulating Descents and Distributions, that this section concerning the legitimacy of the issue of null marriages, is found, and it is for the purposes of this act that the declaration is made. We have no authority, upon grounds of public policy or for the promotion of private morals, to make restrictions or exceptions which the Legislature has not seen proper to make.

The instruction in regard to the marriage in 1830, in the event that no marriage was found by the jury in 1819, is based upon another provision of our act concerning Descents and Distributions in 1822, which declares that "when a man having, by a woman, one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him as his, shall be thereby

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legitimated." Upon the principles heretofore maintained, there can be no question of the propriety of this instruction. In regard to the statute of limitations, the instructions of the circuit court were as follows:

"Upon this branch of the case, you are instructed that a party who acquires title under the statute by continuous possession adverse to the true owner, acquires all the title of such owner, precisely as if the possessor had received a deed from such owner. But, in order to give title under the statute, the possession must have been had during the period limited by statute, which has elapsed since a right of action accrued to the real owner, and must have been adverse, open, notorious, continuous and under a claim of title. And you are instructed further, that the statute begins to run in favor of one in possession of real estate as against the true owner, only from the time when such possession becomes adverse to such owner, and that when such owner is a married woman, and she acquires a right of action during coverture, the statute does not begin to run against her until the disability of coverture has ceased, and that she, and those claiming under her, have three years after the termination of such disability within which to sue for possession unless the occupant has been in possession, openly, notoriously, continuously and adversely, for the term of twenty-four years next before the commencement of such suit. Hence, if you believe from the evidence, that, at the time when, either in person or through their tenants, the defendant, or those under whom he holds, entered into possession of the premises sued for, Cynthia E. Dyer, was a married woman, that she remained a married woman until her death; that within three years after such death, this suit was brought, and that the defendant, and those under whom he holds, had been in possession of the premises sued for during a period of less than twenty-four years next before this suit, then the plaintiffs are entitled to recover, and you will return a verdict accordingly.

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But, on the other hand, if you believe from the evidence, that, at the time when this suit was brought, more than three years had elapsed from the death of said Cynthia, and that the defendant, and those under whom he holds, either through themselves or by their tenants, had been in possession of the premises sued for during a period of ten years or more, next before such suit, that such possession was adverse to all others, open, notorious, continuous and under claim of title, then the plaintiffs cannot recover, and you will find for the defendant. For the purpose of determining whether there has been a claim of title on the part of the defendant, and those under whom he holds, you may have reference to the deeds read in evidence on his part, but such deeds are evidence before you for no other purpose. If you believe, from the evidence, that under such claim of title the parties, under whom defendant holds, either by themselves or by their tenants, took possession of a portion of the tract of which the premises sued for formed a part, asserting the title to the whole tract, and exercising acts of ownership over such tract, either by maintaining fences upon or paying taxes upon the same, then the actual possession of such part was possession of the whole for the purpose of this defense; and you are instructed further, that if you find that the possession of the defendant, and those under whom he claims, was adverse, open, notorious and continuous, as before indicated, then the bar of the statute will prevent a recovery, even if the plaintiffs, and those under whom they claim, had no actual knowledge of such occupancy by the defendant, and those under whom he claims title. If you find for the plaintiffs, you will find that they are entitled to the possession of lots 10, 11, 12 and 13, of block 1, of Darby's addition to the city of St. Louis, those lots being the only part of the tract sued for of which defendant has been shown to be in possession, and you will, if you so find for plaintiffs, assess their damages at the sum of one cent



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and find the value of the monthly rents and profits to be nothing."

The objection to this instruction, is that the tenancy by the courtesy of A. W. Dyer, consummate on the death of his wife, is entirely overlooked. Mrs. Dyer died in 1869 before the bar of 24 years had elapsed. Her estate, not having been barred by the statute of limitations, on her death passed to her heirs. Her heirs, however, could not sue on her death, because her husband survived her, and they had no right of entry or action during his life estate. If the statute of limitations is construed to run against them from the death of the mother, it operated against parties who had no right of action, and who would have been trespassers had they undertaken to enter. Indeed, upon this construction of our statute, had the husband lived three years or more after the death of his wife, the title of the heirs would be totally destroyed, since they cannot sue during the continuance of the particular estate, and before its termination, the three years from the death of the mother have gone by. This would be the result, whether the husband, during the life of the wife, had transferred his estate to some third person by deed, or it had passed to an adverse possessor. *McCorry v. King's heirs*, 3 Humph. 267. So long as he lived, his life tenancy, whether outstanding in a third person or remaining in him effectually prevents any action or entry by the heirs. And thus, if the construction of our statute of limitations given by the circuit court, be correct, the estate of the wife, though not barred during her life, and passing on her death to her heirs, virtually ends with her life.

It is generally understood that the statute of limitations does not run against any one who has no right of possession. Cumulative disabilities are not allowed, or if the 24 years bar had destroyed the estate of the wife of A. W. Dyer, that was an end of the case. The statute, it is true, says nothing of the intervention of a particular estate between the death of the *femme covert* and her heirs, but

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its operation is necessarily suspended until the expiration of the particular estate gave the heirs a right of entry. The person barred by the statute is one whose right of entry has accrued, and who neglects to sue during the three years allowed after his right of action accrues.

This view of the statute of limitations, differing from ours only in the extent of time required to form a bar, is that taken by the Supreme Court of Pennsylvania in *Marple v. Myers*, (12 Pa. St. 122,) and conforms to the opinion also in New York, in *Jackson v. Johnson*, 3 Cowen 92, and of C. J. Hosmer, in *Clark v. Vaughn*, 3 Conn. 191.

This view of the statute practically disposes of the case so far as the statute of limitations is concerned. Whether in the event the suit had not been brought within three years of the death of the husband, the heirs would have been barred by an adverse possession of ten or thirteen years, as was held by the Court of Appeals, is of no practical importance in the case. It is unnecessary to give an opinion on this question until such a case arises.

The judgment of the Court of Appeals is reversed, and the case remanded to the circuit court. The other judges concur.

REVERSED.

HOUGH, J., CONCURRING.—I concur in reversing the judgment and remanding the cause. I adhere to the views expressed by me in the case of *Valle v. Obenhouse*, 62 Mo. 81; so that if there was an uninterrupted adverse occupancy of the land in question, beginning after the birth of issue, and continuing for the period of twenty-four years, neither Mrs Dyer nor her heirs would have been barred thereby. Whatever may have been Mrs. Dyer's rights prior to the birth of issue, most certainly, after the birth of issue, she was not entitled to possession, and therefore as there was no merger of the husband's estate, neither she, nor her heirs could have any right of action until the husband's estate was determined by his death. As Mrs.

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Dyer died before her husband, and as no right of entry could accrue to her by reason of an adverse possession begun after the birth of issue, her children are not limited to three years after her death, as provided by Sec. 6, Art. 2, Chap. 89, Wag. Stat., but are entitled if *sui juris*, to ten years after their right of action accrued, which was on the death of their father, and not before.

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RING V. JAMISON, *Administrator, Appellant.*

1. **Ratification of Infant's Contract.** The validity of a promise by an adult to pay a debt incurred by him during his minority, is not affected by the fact that at the time of making the promise he believed himself legally liable to pay the debt, or by the fact that during his minority his curator kept him supplied with all necessaries
2. **Limitation against Running Account.** When it is fairly inferable from the conduct of the parties to a running account while it is accruing, that the whole is to be regarded as one account, none of the items are barred by the statute of limitations, unless all are (following *Madison Coal Co. v. Steamboat Colona*, 36 Mo. 446 and other cases).
3. **Incompetency of Surviving party as a Witness.** Where one of the original parties to the contract or cause of action in issue and on trial, is dead, the other is not a competent witness, even for the purpose of rebutting testimony given on behalf of the adverse party to show admissions made by himself since the death of the deceased.

*Appeal from St. Louis Court of Appeals.*

The decision of that court is reported in 2 Mo. App. 584.

At the trial a witness for the defendant testified that after the death of Peter Lindell, witness and Ring had a conversation, in which witness told Ring that Peter Lindell had said that Ring owed him \$20,000. Ring, in reply, said, no, that he, Ring, only owed Peter Lindell \$700, etc. In rebuttal, plaintiff offered himself as a witness and testified as to the conversation which took place be-

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tween himself and witness, after Peter Lindell's death. Counsel for defendant objected to plaintiff as a witness on the ground of incompetency. The court overruled the objection and allowed plaintiff to testify as to said conversation. This is the testimony spoken of in the opinion of the court as having been given by the plaintiff in his own behalf.

*Cline, Jamison & Day* for appellant.

1. The account must be mutual, and have items on both sides, for the last item to draw after it those preceding it, and take the same out of the operation of the statute of limitations. *Davis v. Smith* 4 Me. 337; Buller's N. P. 149, 150; *Miller v. Colwell*, 2 South. 577; *Coster v. Murray*, 5 John. Ch. 522; *Tucker v. Ives*, 6 Cowen 193; *Kimball v. Brown*, 7 Wend. 322; *Didier v. Davison*, 2 Barb. Ch. 477; *Hallock v. Losee*, 1 Sandf. 220; *Palmer v. New York*, 2 Sandf. 318; *Cogswell v. Dolliver*, 2 Mass. 217, 221; *Gold v. Whitcomb*, 14 Pick. 188; *Prematt v. Runyan*, 12 Ind. 174; *Buntin v. Logow*, 1 Blackf. 373; *Knife v. Knife*, 2 Blackf. 340; *Todd v. Todd*, 15 Ala. 743; *Wilson v. Calvert*, 18 Ala. 274; *Price v. Upshaw*, 2 Humph. 142. *Penn's Admr. v. Watson*, 20 Mo. 13, was a case where there were mutual running accounts.

2. To constitute a ratification of an infant's contract a mere acknowledgement of indebtedness is insufficient. There must be a substantial promise to pay, with a knowledge of all the facts, and with a deliberate purpose of assuming a liability from which he knows he is discharged by law. *Baker v. Kennett*, 54 Mo. 92; *Highley v. Barron*, 49 Mo. 103; 1 Parsons on Contracts, (5th Ed.) 323; *Ford v. Phillips*, 1 Pick. 202; *Smith v. Mayo*, 9 Mass. 64; *Curtin v. Patton*, 11 S. & R. 305; *Harmer v. Killing*, 5 Esp. 102; *Brooks v. Galby*, 2 Hancock 34; *Hinsby v. Margarity*, 3 Barr 428.

*Laughlin & Cameron*, for respondent, filed no brief.

HENRY, J.—This cause originated in the probate court

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of St. Louis county, on a demand presented for allowance by plaintiff, against the estate of Peter Lindell, deceased, for the sum of \$7,727.75. The account was composed of forty-eight items, all of which were for money lent by plaintiff to or advanced for Peter Lindell, except an item of \$350 for diamond studs alleged to have been sold by plaintiff to said Lindell. The money was paid and advanced by plaintiff at different times, from February 10th, 1868, to August 3rd, 1871. The account had no credits. In the probate court there was a judgment for defendant. Plaintiff appealed to the circuit court where he obtained a judgment for \$7,707 and  $\frac{2}{10}$ . Defendant appealed to the general term, where the judgment was affirmed, from which he appealed to the Court of Appeals, where the judgment of the circuit court was affirmed, and he has brought it here by appeal. There was evidence which tended to prove that the account was correct. There was also evidence tending to show that it was not. The deceased, Peter Lindell, attained his majority 10th October, 1870, and all of the indebtedness, except \$1,350 accrued, if at all, while he was a minor. He was a young man of wealth, who was unfortunately addicted to gaming, and some of his associations were evidently not of the most reputable character. Mr. Jamison, who administered on his estate, was also the curator of his property while a minor, and the evidence shows that young Lindell was frequently in possession of large sums of money, as much as \$5,000 and \$8,000 at a time; that he was prompt to pay his gaming debts, sometimes incurred at cards, and occasionally on bets on horse racing. One witness, a saloon keeper, testified that on the 22nd or 23rd of April, 1872, Peter Lindell stopped in front of his saloon in his buggy, and sent a colored man he had with him into the saloon for a glass of beer; that about that time, the plaintiff came into the saloon, and called Lindell in to take a glass of wine with him, and that plaintiff said to Lindell, "Pete, I am pretty near broke, I want to get some money." Lindell replied,



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‘I can’t give you money now; you will have to wait a while; you will have to wait six months.’ And after some other conversation, in which Lindell admitted his indebtedness to plaintiff, the latter took from his pocket a book, in reply to a question by Lindell, “how much do I owe you, anyhow?” added up the items in the book, showed it to Lindell, and asked him if it was right? And he said it was. Plaintiff wrote the amount on a card and handed it to Lindell. Witness said the amount was \$7,727  $\frac{75}{100}$ , and that Lindell agreed to pay it, with six per cent. interest, in six months. This was about eighteen months after Peter Lindell became of age.

The court, at the instance of plaintiff, gave an instruction in substance, that if, after he became of age, Lindell admitted his indebtedness to Ring in the aggregate amount of the several items of plaintiff’s account, and agreed to pay it, then the jury should find for plaintiff, whatever they might find still due to plaintiff, with six per cent. interest. The following asked by defendant the court gave: That if Ring owed Lindell at the death of the latter, the jury should find for defendant; but refused the following: 1. The acknowledgement of indebtedness by Peter Lindell after he became of age, believing himself liable to pay the same, is not a ratification of the account sued upon, and if the account sued upon accrued while he was a minor, the verdict should be for defendant. 2. If any of the items of the account accrued more than five years before the commencement of the suit, plaintiff is not entitled to recover for such items. 3. If the curator of Peter Lindell supplied him with all necessities while he was a minor, and the account sued upon accrued while he was a minor, then plaintiff cannot recover. 4. If his curator supplied him with all necessities while he was a minor, and plaintiff loaned Peter Lindell money, or sold him diamonds, or other property while he was a minor, then plaintiff cannot recover.

If the instruction given by the court for plaintiff is

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the law applicable to the facts which the plaintiff's testimony tended to prove, the court did not err in refusing the first, third and fourth instructions asked by defendant. The first declared a contrary doctrine to that of the plaintiff's instruction, and the third and fourth declared in substance that plaintiff could not recover, although the jury should find that after Lindell became of age he acknowledged his indebtedness, and promised to pay it in six months with interest. We have no doubt that plaintiff's instruction correctly declares the law, and the opinion of the Court of Appeals is a very satisfactory elucidation of the law on that subject, and relieves us of the necessity of discussing the question. The court having properly given plaintiff's instruction, did not err in refusing the first, third and fourth asked by defendant.

The second instruction asked by defendant presents a question of more difficulty, because the weight of authority is against the decisions of this court on that question. But our decisions have been acquiesced in for years, and no good results would be accomplished by reopening the question. They are to the effect that when the account sued on is a running account, and it is fairly inferable from the conduct of the parties while the account was accruing, that the whole was to be regarded as one, as in case of a merchant's account against a customer, none of the items are barred by the statute unless all are. The Missouri cases are cited in the opinion of the Court of Appeals, and fully sustain that court in its conclusion. *Vito Viti v. Dixon*, 12 Mo. 480; *Steamboat v. Beehler*, 12 Mo. 477; *Madison Co. Coal Co. v. Steamboat Colona*, 36 Mo. 446; *Boylan v. Steamboat Victory*, 40 Mo. 250; *Finney v. Brant*, 19 Mo. 45. Other errors are assigned, but as they were considered, and in our opinion properly determined by the Court of Appeals, except one, we will pass them by without any remark, except that we concur in its opinion in regard to them.

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On the trial of this cause, the circuit court permitted plaintiff to testify in his own behalf. This under former

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OF A SURVIVING  
PARTY AS A WIT-  
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decisions of this court, was error. In *Angell v. Hester*, 64 Mo. 142, this court said: "We take the true distinction to be, that where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party to such contract or cause of action, will not be permitted to testify to any fact which he would not have been permitted to testify to at common law; that when one of the parties is dead, the other party stands, in regard to testifying, precisely as if the statute allowing persons to testify (parties was intended) had not been enacted." The statute is in derogation of common law. If both parties to the contract or cause of action, are alive, they can testify as other witnesses, without any restrictions, except such as apply to other witnesses, but not so if one be dead. The substance of the provision is, that if both parties are alive, both may testify, but if one be dead, then the common law is in full force as to the competency of the survivor as a witness in his own favor. "The test of competency" (said Wells, J., in *Granger v. Bassett*, 98 Mass. 462,) "is the contract or cause of action in issue and on trial, not the fact to which the party is called to testify." The test given by the learned judge in *Granger v. Bassett*, we think a correct one, with the exception of those cases at common law in which a party could testify to certain facts and not generally, and if I do not understand the learned judge to hold that in Massachusetts, a party is not still competent to testify in those cases, whether the other party be dead or alive. *Coughlin v. Haenssler*, 50 Mo. 126; *Looker v. Davis*, 47 Mo. 145; *Amonett v. Montague et al.*, 63 Mo. 201; *Sitton v. Shipp*, 65 Mo. 297. All concurring, the judgment is reversed, and the cause remanded.

REVERSED.

*BOONE et al., Plaintiffs in Error, v. STOVER et al.*

1. **Mining License: COVENANTS.** An instrument in writing, under seal, granting permission to mine on a certain lot, so long as the grantees do regular mining work on the lot, is a license, and a grant of an incorporeal hereditament, which is not revocable except for breaches thereof by the grantee, and contains, in effect, a covenant, on the part of the grantor, that the grantee, in respect to his mining privilege, shall be free from the interruptions or claims of others.
2. ———: **LEASE.** Such an instrument is not a lease, for the reason that it does not pass such an estate in possession in the land, as would entitle the grantee to maintain ejectment.
3. **Misnomer of Instrument sued on: VARIANCE.** In an action for breach of covenant for quiet enjoyment contained in an instrument designated in the petition as a lease, but of whose contents the defendant is fully apprised, if the instrument, when produced on the trial appears to be not a lease but a mining license, an amendment of the petition may properly be made, but there is no such variance between the allegation and the proof as to authorize a non-suit.

*Error to Morgan Circuit Court.*—HON. GEORGE W. MILLER,  
Judge.

Action for damages for breach of an implied covenant for quiet enjoyment of a mining right granted by an instrument under seal. At the trial plaintiffs were forced to take a non-suit. Hence, this appeal.

*Spurlock & Richardson* for plaintiffs in error.

1. Implied covenants for peaceable and quiet enjoyment arose from the instrument or lease. There can be no doubt of this, where rent was paid and received, as in this case. 4 Cruise's Dig. title, lease, p. 51, marginal 68; *Mack v. Patchin*, 29 How. (N. Y.) 20; *Hamilton v. Wright's Admr.*, 28 Mo. 199; *Vernam v. Smith*, 1 Smith (N. Y.) 327; 2 Story on Contr., Sec 906. In this case the defendants had made a prior lease under which the plaintiffs were evicted, and that of itself was a breach of the implied covenant.

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*J. L. Smith* for defendants in error.

1. The mining permit, under which plaintiffs entered into possession of the premises, does not contain any covenant for quiet enjoyment, nor any words from which the law will imply such covenant. The words "have permission," are neither a translation nor the equivalent of the words *demisi*, *concessi*, and unless this is so, no covenant will be implied. There is none growing out of the simple relation of landlord and tenant. *Meador v. Carondelet*, 26 Mo. 112.

2. The instrument referred to is not a lease, it is a mining license. 1 Washburn Real Prop. 148; *Cook v. Stearns*, 11 Mass. 533; *Bainbridge Mines & Min.*, pp. 129, 39, 237, 269, 321; *Chicago Oil Co. v. U. S. Pet. Co.*, 57 Penn. St. 83; *Norway v. Rowe*, 19 Vesey 158, 144; *Chetham v. Williamson*, 4 East 464; *Doe d. Hanley v. Wood*, 2 B. & Ald. 724; *Thomas v. Sorrel*, Vaughan 330.

NAPTON, J.—In this case we are under no necessity of referring to the distinction which is recognized, both in England and in this country, between parol covenants. 1. MINING LICENSE: licenses and licenses by deed, which in some cases is important. The distinction is clearly, though somewhat quaintly explained by C. J. Vaughn, in *Thomas v. Sorrel*, (Vaugh. 351), "a dispensation or license properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, without which it had been unlawful, as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down, they are grants. So to license a man to eat my



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meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten and in the wood burnt. So as, in some cases, by consequence and not directly, and as its effect, a dispensation or license may destroy and alter property."

A license, therefore, which gives some usufruct of the land itself, is an incorporeal hereditament, and can only be created and transferred by deed. Bainbridge on Mines 252. The deed produced in evidence in the present case, was a license and a grant of an incorporeal hereditament. This deed, had it contained formal provisos and covenants entered into by both parties, would have had the same effect as a lease, though not technically one. *Muskett v. Hill*, 7 Scott 855; 5 Bing. N. C. 694. It was not revocable, because it was not simply a license which might be by parol, but was accompanied with the grant of a beneficial privilege in lands. It contains covenants on the part of the grantees to deliver weekly all minerals raised on the lot to the Granby Mining and Smelting Company, or their agents, at the current market prices, and to perform not less than twenty days work every calendar month, unless prevented by sickness or unavoidable accident, and authorizes the Granby Mining and Smelting Company, by their agents, to inspect the work, whenever they desire, and empowers such agents, when they are of opinion that said work is not done in a workmanlike manner, or when any other agreement or covenant of the grantees is not complied with, to re-enter and take possession of the mine, without resorting to any court of law or equity. On the part of the grantors the deed gives permission to plaintiffs, the grantees, to mine on the lot described in it, "so long as they do regular mining work on said lot." Being under seal, and granting not merely a permission, but a beneficial privilege in the lot, it was not revocable except for breaches of the contract by the grantees. The grantors could not eject the grantees

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while the latter were doing "regular mining work." Mr. Bainbridge in his work on Mines and Mining observes, that "it may be generally laid down, that if it appears to be the intention of a deed of grant or license, that the grantee should be solely and exclusively entitled to work for mineral, the grantor will be afterwards precluded from abridging or derogating from his grant by any attempt to exercise a right similar only in deed, but incompatible with his former disposition. This intention should properly appear in the granting part, for the use of the granting part is to give an accurate description of the thing granted. It is an essential part of the thing granted that it is freed from the interruptions and claims of others." (Ch. 8, Sec. 4, p. 255.)

Mr. Taylor, in his Treatise on Landlord and Tenant, also makes a similar observation. "A license may have the force of a grant of an incorporeal hereditament if it be valid and delivered; and if granted for a consideration, it may take effect as a covenant; as, if it authorizes the party to whom it is made to go upon the land of the party granting it, to use the land for his own profit; in which case it would be equivalent to a lease, or it may be limited to some particular purpose, as to cut wood, to draw water, &c., and in either case would be supported as a covenant, and effect would be given to it, in the same manner as any other contract." The thing granted in this case is the privilege of mining on a described lot so long as regular mining work is done by the grantees. It is essential to this, that this privilege be not interrupted by others. So that, in effect, there is in this grant a covenant that the thing granted shall not be interrupted, although the word covenant is not used. An agreement under seal "for the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not exist," is a covenant, and the covenant is an express one, for express covenants are those created by the express words of the parties to the deed (Platt Cov., 25), and the

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formal word covenant is not indispensably requisite for the creation of an express covenant. 2 Mod. 268; 3 Keble 848; 13 N. H. 513; Bouvier, L. D., Title, Covenant.

These observations are based exclusively on the documents and other testimony submitted by the plaintiffs on 2. —: lease. the trial; but as the word "lease" and "leased premises" are occasionally used in the petition, and the question decisive of the case depends on whether there was a total failure of evidence to support the petition as it was drawn, it is proper to notice the characteristics which distinguish a lease from a license. A lease is defined in Cruises' Digest, (Ch. 5, Vol. 4,) as a contract for the possession and profits of land and tenements, on the one side, and a recompense of rent or other income, on the other. The words "demise, lease and to farm let," are the proper ones to constitute a lease, but any other words which show the intention of the parties that one shall divest himself of the possession, and the other come into it, for a certain time, whether they are in the form of a license, covenant or agreement, are of themselves sufficient; and will in construction of law, amount to a lease as effectually as if the most proper words had been used for that purpose. *Hamilton v. Wright's Admr.*, 28 Mo. 199. By a lease, the lessee obtains an estate in possession of the land and its products, in respect to which he can maintain ejectment; but, in a license or grant of an incorporeal hereditament the grantor does not divest himself of the possession, and the liberty of working a mine or mines on it is not inconsistent with the retention of possession by the grantor.

The case of *Doe d. Hanly v. Wood*, (2 B. & Ald. 736,) explains this distinction. That was an ejectment and brought on a mining license granted by deed, but the court of King's Bench held that an ejectment could not be maintained on it, though the license was, like the present, irrevocable. The Chief Justice, (Abbott,) observes in this case: "Instead of parting with or granting or demising

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all the ores, metals and minerals, which were then existing within the land, its words import a grant of such parts thereof as should, upon the license to search and get, be found within the described limit, which is nothing more than the grant of a license to search and get, (irrevocable indeed on account of its carrying an interest) with a grant of such of the ore as should be found and got, the grantor parting with no estate or interest in the land. If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals or minerals ungot therein; but he had a right of property only as to such part thereof as upon the liberties granted should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines or metals or minerals within the land, and is such a right only, as under the circumstances stated in the case, is not sufficient to support an ejectment." It is conceded at the same time by the Chief Justice that an eviction by the grantor or any one under him, would be wrongful, unless as authorized by the grant. The implied covenants in a lease are, that no person claiming through or under the lessor, or having a superior title to him, shall disturb the lessee in the quiet enjoyment and use of the premises leased, and a breach of this covenant occurs when the ouster is by one holding a prior lease. *Andrews v. Paradise*, 8 Mod. 318; *Salmon v. Bradshaw*, Cro. Jac. 304; *Ludwell v. Newman*, 5 T. R. 458; Rawle on Cov., Ch. 6.

The writing obligatory, then, produced on the trial, was beyond doubt a license and not a lease, and the only remaining question to be determined is, whether the deed and the accompanying proof on the trial was such a departure from the allegation of the petition as properly to subject the plaintiffs to a non-suit. The action in this case is for damages occasioned

3. MISNOMER OF INSTRUMENT SUED ON: variance.

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by a breach of covenant in a deed executed by defendants, which is said in the petition to be a lease or writing obligatory. The paper is alleged to be in the possession of the partner of one of the defendants, and the court is asked to make an order for its production in court. The defendants, who executed the writing obligatory, were fully apprised of what it contained, and the miscalling it a lease was of no consequence, provided it contained such stipulations or covenants as the plaintiffs charged that it did. The gist and entire scope of the action was to recover damages for the breach of a covenant, express or implied, in a writing obligatory, under which plaintiffs had taken possession of a mine, and had expended labor in developing it. That the writing obligatory proved to be a license instead of a lease, might have suggested the propriety of an amendment; but, if the license contained the covenant sued on, the defendant was equally liable as though it had been a lease. Where one cause of action is stated in the petition, and another proved, we are aware that under our code and the decisions on its construction, the plaintiff is rightly non-suited. 17 Mo. 585; 19 Mo. 30. But the cause of action here proved is essentially the one stated; it is the breach of a covenant in a deed. The deed is sufficiently identified, and the only objection to the petition is that it gives the deed a wrong name. The covenant broken is in the deed produced.

Judgment reversed and case remanded. The other judges concur.

REVERSED.



EVANS, *Appellant*, v. BLACKISTON.

**Execution of Testamentary Powers:** STATUTE CONSTRUED. A power to sell land and invest the proceeds of sale, conferred by a will may, under the statute, (Wag. Stat., p. 93, § 1,) be executed by an administrator with the will annexed, the donee of the power having refused to execute it. (HOUGH, J., dissenting).

*Appeal from Buchanan Circuit Court*—HON. JOS. P. GRUBB, Judge.

*Allen H. Vories and James P. Thomas* for appellant.

1. The will did not confer upon Colhoun a mere power of sale, but vested in him a title in trust, personal and discretionary, and which could not be exercised by the administrator, such as purchasing lots and erecting houses on them. *Conklin v. Egerton*, 21 Wend. 430; *Northrop v. Wright*, 24 Wend. 223; *Judson v. Gibbons*, 5 Wend. 224; *Denne v. Judge*, 11 East 288; 2 Williams on Executors 815; 2 Jarman on Wills 144; *State v. Boon*, 44 Mo. 260.

2. The land being vested in Colhoun, as trustee, could not have been sold by him as executor; and although the offices of trustee and executor, were vested in the same person, they remained as distinct and separate as if vested in different individuals, and their duties, under the will, as clearly defined. *Denne v. Judge*, 11 East 288; *Conklin v. Egerton*, 21 Wend. 430; 24 Wend. 223.

3. In all the cases relied upon by the respondent, and cases decided by this court, there was only a power to sell uncoupled with an interest. *Dilworth v. Rice*, 48 Mo. 124

*Woodson & Hill* for respondent.

NORTON, J.—This action is ejectment for the recovery of one acre and a half of land in the city of St. Joseph, Buchanan county. The petition is in usual form. The

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answer, in addition to a general denial, sets up the acquirement of title to the land in dispute, through an administrator's deed and the making of valuable improvements thereon. The cause was tried by the court without the intervention of a jury, and judgment rendered for the defendant, from which the plaintiff has appealed to this court. Both plaintiff and defendant claim title through one Jane K. Frame, who died in 1859, leaving a will containing the following clause out of which this controversy springs, viz: "I will, devise and bequeath unto my friend Edmund R. Colhoun, as trustee, all my real estate, lands and tenements, situate in Buchanan county, Missouri, being about one acre and one-half in the city of St. Joseph, lying west of the Willow Grove property, for the following uses and purposes: said real estate to be divided off into lots, and by him sold at his discretion, and the proceeds thereof I direct, devise and bequeath, shall be invested in purchasing some convenient lot in said city and erecting thereon a dwelling house, said title to said land and dwelling house to be by him taken in the name of my sister, Eliza Beckam, for and during her natural life, with remainder to her three children, Mary Jane, Townsend T. and John H. C. Beckam, to be equally divided between them at her death." The sixth clause of the will appoints Edmund R. Colhoun executor to carry out the provisions of the will. It is conceded that Colhoun qualified as executor, the will having been duly probated, and that he thereafter left the State without executing the trust and abandoned or declined to execute the same. It appears that on a presentation of these facts by petition in the circuit court of Buchanan county, an order was made by said court appointing plaintiff as trustee for the said Eliza and her three children, for the purpose of executing the trust. This order was made on the 11th of June, 1873. It was admitted on the trial that, prior to the appointment of plaintiff, as trustee, to-wit: at the July term, 1869, of the probate court of Buchanan county, one W. S. Everett, had been

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appointed administrator, with the will annexed, of the said estate of Jane K. Frame, deceased, and had duly qualified as such, and had sold and conveyed, by deed, the real estate mentioned in the petition and will to the defendant.

The judgment of the court below was for the defendant, and the only question arising or necessary to be determined upon the state of facts presented in the record, is as to the validity of the sale and conveyance of the land of the testatrix, to defendant by Everett administrator with the will annexed. If valid, the judgment of the trial court was for the right party; if invalid and unauthorized, the judgment should have been for plaintiff. This question finds its solution in Sec. 1, Wag. Stat., 93, which is as follows: "The sale and conveyance of real estate under a will, shall be made by the acting executor or administrator with the will annexed, if no other person be appointed by the will for that purpose, or if such person fail or refuse to perform the trust." It is a favorite maxim in equity that a court of chancery will not permit a trust to fail for want of a trustee, and this principle not only finds recognition in the above expression of legislative will, but designates in the class of cases therein mentioned what class of persons shall execute the trust. It was doubtless the design of the Legislature by this general provision, to get rid of the slower and more expensive proceedings which a resort to a court of chancery in such cases would involve. The language of the statute is broad and comprehensive, and we can perceive no reason for restricting its operation to narrower limits than the natural and usual import of the words employed. It is evident that Colhoun had failed and refused to perform the trust, for he had abandoned it and left the State. This fact is not disputed by plaintiff. If effect is to be given to the statute upon such failure or refusal, the right of the administrator with the will annexed to proceed to its execution at once arose. Notwithstanding the fact that the devise was made to Colhoun in

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trust, &c., if he had sold and executed it, the sale made by him would have been under the will and by virtue of the power it conferred. If the sale then could only have been made under the will, and Colhoun, who was appointed to make it, refused or failed to do so, it follows necessarily from the very terms of the law that the acting executor or administrator, with the will annexed, should make it, for so it expressly declares. The act transposed, so far as it applies to the question in hand would read thus: If any person be appointed by a will for the purpose of selling real estate, and fail or refuse to perform the trust, the acting executor or administrator, with the will annexed, shall perform or execute it. It was doubtless intended by the Legislature, through this enactment to get rid of the obstructions, and subtle distinctions prevailing as to the persons who should be charged with the execution of a power conferred in a will, when the appointee or appointees of the power declined or failed to execute it. It seems to be conceded in the argument of counsel that if Colhoun had simply been appointed in the will to sell the land for the purposes therein named, and had refused to act, the administrator, with the will annexed, could have made the sale, but it is argued that, inasmuch as the land was devised to him in trust, to be by him sold at his discretion, thereby the trust became personal, and the legal estate so vested in him as to require the interposition of a court of chancery to effect the sale in the event of his refusal to act. Notwithstanding this formal investiture of title in Colhoun, he is nevertheless the donee of a power, and charged with the duty of selling the land for the use of certain beneficiaries named in the will, and would have conveyed this estate by virtue of the power thus conferred, had he sold the land. We are not able to perceive any reason why, in the event of his refusal to act, the administrator with the will annexed cannot execute the power under direct legislative warrant, as well as a trustee under an appointment of the chancellor could do. The bondsmen of such administra-

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tor would be liable for the faithful performance of any duty imposed upon him by law, as much so as the bondsmen of a trustee appointed by the chancellor, if the chancellor required a bond, which he might, or might not do.

In the case of *Dilworth v. Rice*, 48 Mo. 124, a similar question to the one under consideration, was presented. In disposing of it, Judge Wagner approvingly quotes the case of *Brown v. Armstead*, 6 Rand. 593, which arose under a statute similar to our own. The will in that case provided "that the executors thereafter appointed should sell at public auction all my land, provided said land shall sell for as much in their judgment as will be equal to its value; and the money arising from such sale, to be placed in the hands of my friend Stark Armstead, one of my executors hereinafter appointed, whom I vest with power to apply the said money to any use or uses he, in his discretion, may deem best, for the benefit of my wife and all my children." All three of the executors refused to act. An administrator with the will annexed was appointed, who made the sale and executed a conveyance to the land sold. It was held in that case that the power was well executed. It will be observed that in the case of *Brown v. Armstead*, *supra*, the three executors were invested not only with a discretion to sell, but the proceeds were to be placed in the hands of one of them, who was to apply it to any use or uses which he, in his discretion, might deem best for the benefit of the testator's wife and children. In the case before us, Colhoun, although invested with a discretion in selling, had no discretion as to the use to which the money was to be applied. He was directed to apply the proceeds in a particular and specific manner to the purchase of a lot in St. Joseph, and the erection of a house on it. Effect has been given to this statute in the case of *Dilworth v. Rice*, *supra*, and also in the case of *Coil v. Pittman*, 46 Mo. 51.

It is argued that in both the above cases the question raised was under wills giving the power to executors to sell. While this is true, it by no means follows, because



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another person than the executor is made the donee of the power, that the executor or administrator, with the will annexed, cannot, in the event of such person failing to act, execute it. On the contrary, the statute expressly provides for just such a case, and confers in unambiguous terms on the acting executor or administrator the right to act.

We think the judgment of the court was for the right party, and it will, therefore, be affirmed, with the concurrence of the other judges, except Judge Hough, who dissents.

AFFIRMED.

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IN THE MATTER OF BURRIS, *Appellant*.

1. **Section 32, Article 4, Constitution of 1865**, required that the title of an act of the Legislature should indicate the general subject of the act, but did not require that it should set out its substance.
2. **Clerk's Fees**: SECTION 24, ARTICLE 6, CONSTITUTION of 1865, fixed the maximum of the compensation of clerks of courts at twenty-five hundred dollars, but left it to the Legislature to determine what compensation they should receive within that maximum. (SHERWOOD, C. J., dissenting.)
3. **Constitutionality of Laws**. The courts are warranted in declaring an act of the Legislature void only where there is a clear conflict between it and the Constitution.

*Appeal from Clay Circuit Court.*—HON. GEO. W. DUNN,  
Judge.

*D. C. Allen* for appellant.

1. The construction and plain meaning of Sec. 24, Art. 6, logically and grammatically demand that the words "over that sum," be held to refer to the previously mentioned sum of \$2,500, for the simple reason that there is no other sum mentioned. The direction to pay the surplus *over that sum* entirely excludes the idea that the court has power to direct the payment of a surplus over a *less*

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sum, and forbids the court to allow the clerk to retain for his own use a greater sum than \$2,500. The section fixes the standard for the court, and does not allow it to draw the line above or below it. When the court has allowed for deputies and assistants, it has only one power left, to exhaust its function under section 24, and that power is to direct the clerk to pay all surplus *over that sum* into the county treasury. After allowances to deputies and assistants, the court has no option to vary to the right or the left, but only to direct the payment of the surplus *over that sum*, or, over \$2,500, the sum previously mentioned in the section, into the county treasury.

2. The act of March 30th, 1874, is unconstitutional and void, as being in contravention of Sec. 32, Art. 4, constitution 1865. The title does not indicate whether the act refers to the amount of the compensation or salary of clerks, to their fees for the individual items of clerical labor, (as in Wag. Stat., p. 618,) to their clerical duties, (as prescribed in many statutes,) or whether it is an act penal in its nature, inflicting penalties for misfeasance, malfeasance or non-feasance. The title does not refer to the subject of fees. The purpose of Sec. 32, Art. 4, plainly was that the title of an act should impart an idea of its contents. Would any one suppose from the title of this act that it was intended to enforce Sec. 24, Art. 6, of the constitution?

*W. H. Woodson, contra.*

1. It could not have been intended by the provisions of this section that the Legislature had no power to fix the amount of the salary of the clerk of a court at a less sum than \$2,500. The constitution merely restricts the power of the Legislature and forbids a greater sum than \$2,500 to be given a clerk. If this is not the meaning why the necessity of demanding that the General Assembly shall pass laws to carry into effect the provisions of the section?

If there had been no legislation making a deduction from this amount then appellant under the facts and said section would be entitled to the sum of \$2,500. If, however, the Legislature has enacted a law fixing the fees of clerks at a less sum than \$2,500, and that too prior to the adoption of the constitution of 1875, then appellant can only receive the amount so fixed by law for his services as clerk, and such act of the General Assembly would not be unconstitutional and void, as contended by appellant in his instruction. It has enacted such a law in the act of March 30th, 1874.

2. Surely the constitution of 1865 did not intend that the title to acts of the Legislature, where only one subject matter was the subject of legislation, should specially set forth the contents of each and every section of the act. There are but few, if any, titles to acts in the session acts of the General Assembly for the year 1874, more clearly set forth than in the title of the act approved March 30th, entitled "An act in relation to clerks of courts of record." All that the constitution demands has been complied with in the title of the act aforementioned. All that it required was to have the titles of all laws passed, sufficiently stated so as to enable one to know at a simple glance at the title the subject matter of the act—whether it be in relation to clerks, administrators, executors, guardians and curators, corporations, or any other subject.

HENRY, J.—During the year 1875, Luke W. Burris was clerk of the county court of Clay county, and on the 11th day of February, 1876, he filed with said county court a statement of the fees and emoluments received by him as clerk during the year 1875, showing an aggregate of \$3,605.46. This statement was finally passed upon by the county court at its November term, 1876, and allowing said clerk \$1,500 paid to assistants, and \$1,500 for his compensation, ordered him to pay into the county treasury the balance, \$605.46. From this judgment he appealed to the

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circuit court of Clay county, and that court having affirmed the judgment, he has prosecuted his appeal to this court. The 24th section of the 6th article of the constitution of 1865, provided that, "no clerk of any court established by this constitution, or by any law of this State, shall apply to his own use, from the fees and emoluments of his office, a greater sum than two thousand five hundred dollars for each year of his official term, after paying out of such fees and emoluments, such amounts for deputies and assistants in his office as the court may deem necessary and may allow; but all surplus of such fees and emoluments over that sum, after paying the amounts so allowed, shall be paid into the county treasury for the use of the county. The General Assembly shall pass such laws as may be necessary to carry into effect the provisions of this section." The General Assembly by an act entitled "an act in relation to the clerks of courts of record," approved March 30th, 1874, (Sess. acts of 1874, page 63,) declared that "The aggregate amount of fees that any clerk of a court of record shall be allowed to retain, shall not in any case exceed the amounts hereinafter set out. In all counties having a population of forty thousand persons, or over, the clerk shall be permitted to retain twenty-five hundred dollars. In all counties having a population of thirty thousand and less than forty thousand persons, the clerk shall be allowed to retain twenty-two hundred and fifty dollars. In all counties having a population of eighteen thousand, or over, and not exceeding thirty thousand persons, the clerk shall be allowed to retain two thousand dollars; and in all other counties the clerk shall be allowed to retain the sum of fifteen hundred dollars per year—in all cases the population to be ascertained from the last State, or United States census." The population of Clay county in 1875, it is agreed, was less than eighteen thousand. Appellant contends that the act of the Legislature is in conflict with the 24th section of the 6th article of the constitution of 1865, and also with the 32nd section of the 4th article of said

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constitution, which is as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed."

We do not think that the act was unconstitutional, because in the title the particular subject of the act was not stated. It was not intended that the substance of the act should be embraced in the title; but that the subject should be stated in general terms, not specifically. For instance, an act was passed by the General Assembly in 1877, entitled "An act for the protection of married women." The title does not indicate in what that protection was to consist. By the title alone, one would not know whether it was to protect married women in their rights of property or in their persons, or in what manner the protection was to be afforded, whether by conferring upon them the right of suffrage, or the right to control intemperate and improvident husbands, and providing means by which that object could be accomplished by them; but it does apprise one that it is a law for their protection, and any provision in the law not cognate to that general subject, would be unconstitutional. The constitutional provision simply requires that the title shall give information of the general subject of the act, and that the act shall not contain provisions in nowise pertaining to that general subject. Here the title was, "An act in relation to the clerks of courts of record," and sufficiently indicated, not what its specific provisions would be, or to what duties of such officers it would relate, or how it would affect them, which the constitution did not require, but that its provisions would relate to clerks of courts of record, and nothing else.

Whether the law was in conflict with the 24th section, article 6, is a more difficult question. The clerks of courts



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2. CLERK'S FEES:  
section 24, article  
6, constitution of  
1865.

of record receive no salaries, but derive their compensation from fees fixed by law, for services by them from time to time rendered. The clerks of some courts do not realize \$2,500 per annum from the fees and emoluments of their offices, while others now, as in 1865, realize amounts from the fees and emoluments largely exceeding \$2,500. What object did the framers of the constitution of 1865 intend to accomplish by the section under consideration? Was it to fix the salaries of clerks of courts? It does not provide that they shall receive \$2,500 as a salary or compensation; for the fees and emoluments of the office, in many counties, would not then, or since, yield that amount. The constitution of 1865 did not fix the salary of any other officer, not even the highest executive or judicial officer, and it is difficult to believe that the convention regarded the salaries of clerks of courts of record, as of such importance as to demand that they should be prescribed by the constitution, leaving salaries of all the other officers in the State to be established by the Legislature. Section 13, article 9, of the present constitution, provides that "the fees of no executive, or municipal officer of any county, or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of \$10,000." It requires the officers to make quarterly returns of all fees received by them, and of the salaries actually paid to their deputies and assistants, but makes no provision in regard to the surplus. The first clause of the 24th section of article 6 of the constitution of 1865, is substantially the same as the 13th section of article 9 of the present constitution, except as to the sum; and if the section contained nothing more, there could be no doubt that it would be construed as fixing the maximum of the compensation of clerks of courts, and leaving to the Legislature to determine what compensation they should receive within that maximum. It is the latter clause of the section which makes the difficulty. It provides that the surplus over

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\$2,500 and clerk hire, shall be paid into the county treasury; but does it necessarily forbid the Legislature from requiring a greater amount to be paid into the treasury? It requires the Legislature to pass an act for the enforcement of the provision, that so much shall be paid into the county treasury, but by no reasonable construction is it prohibited from requiring a greater amount of the fees and emoluments to be so disposed of. The General Assembly is under no restrictions as to legislation, except those imposed by the Constitution of the United States, or the Constitution of the State. The only express injunction upon the Legislature in section 24, is to enact laws to enforce its provisions; and it contains no express inhibition, except that no clerk shall receive exceeding \$2,500, and we think no implied inhibition, except that the General Assembly shall not pass any law requiring less of the fees and emoluments received by the clerk than is required by that section, to be paid into the county treasury. The provision that they shall not receive more than a stated amount, is not equivalent to a provision that they shall receive that amount. A constitutional provision that an officer shall not receive a salary exceeding \$5,000, is not to be construed as fixing his salary at that sum. After limiting the amount of the fees and emoluments which the clerk should retain for himself and the pay of assistants, the question naturally arose what should be done with the surplus? And to meet that suggestion, the latter clause required the surplus "over that sum" to be paid into the county treasury. Suppose that the words "over that sum," had been omitted; no difficulty would have existed. It would not then have been contended that the Legislature could not make the compensation less. The whole force of the argument, therefore, in favor of appellant, is derived from the use of the words, "over that sum." The constitution requires the General Assembly to pass an act or acts by which that surplus, at least, shall be paid into the county treasury. The General Assembly passed

an act requiring not only that amount, but a greater amount of the fees and emoluments of clerks to be paid into the county treasury. With what portion of that section is it in conflict? Clearly not with that which limits the amount of the clerk's compensation to \$2,500, not with that which requires the surplus of fees and emoluments over \$2,500 and clerk hire, to be paid into the county treasury. Here is a complete compliance with the constitutional provision, and a violation of no injunction contained in that provision either express or fairly inferable from its language. Requiring that amount to be paid into the county treasury is not a prohibition against a legislative act requiring more.

If the framers of the constitution had meant what is contended for by appellant, it would have been so clear and natural a declaration of that intent to provide, "That every clerk of a court of record shall receive per annum for his own use, all the fees and emoluments of his office until they amount to \$2,500, and such additional sum as the court may allow of such fees and emoluments for assistants, and the surplus shall be paid into the county treasury," that we cannot conceive why this, or similar phraseology was not employed; and that it was not, is a strong argument against the construction of the 24th section for which appellant contends. It does not say how much the clerks shall receive, but what they shall not receive, and that whatever the legislative will might be on the subject, the General Assembly should not allow a greater compensation than the amount named in that section, and if it should fix no amount of compensation whatever, it should at least carry out that provision of the constitution. This we think the reasonable construction of that section. What was the evil to be remedied? The fees in some counties yielded the clerks a compensation wholly disproportioned to the labor and responsibility connected with the offices, while in others, they yielded an inadequate compensation for the devotion of their whole

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time by the clerks to the duties of their offices, and it was to remedy that inequality, to some extent, that the provision was adopted.

But, admitting it to be a doubtful question, our duty is to uphold the act of the Legislature. Only when there is a clear conflict between a legislative enactment and the constitution, are courts warranted in declaring the law to be void. It is then a duty from the performance of which they should not shrink, but it is equally a duty to sustain the law when not clearly in conflict with the constitution. That much deference is due to a co-ordinate branch of the government. The judgment of the circuit court is affirmed. All concur except NORTON, J., not sitting, having been of counsel, and SHERWOOD, C. J., dissenting.

AFFIRMED.

SHERWOOD, C. J., DISSENTING.—I do not wonder that my learned associates experienced difficulty in arriving at the conclusion they have announced. I take it that the same rules of construction should prevail, whether you call the instrument a constitution or a contract; that all that is requisite in construing either, is to ascertain and follow the intent of the framers of the instrument. (Sto. Const., § 400; Potter's Dwaris). Mr. Justice Story, who, in his day, was thought to be conversant with the rules governing constitutional construction, said: "Constitutions  
\* \* \* are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understanding. The people make them; the people adopt them; the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." (Sto. Const., § 451.) Let us apply, in the present instance, the rules of "common sense," and carefully note the result. If I tell a tenant on my farm, that

all over two-thirds of the crop of grain he raises on my premises, is to be delivered into my granary, does he not at once understand that he is to retain the residue? And would it not be the theme of long-continued rustic ridicule, should I, under such a contract, lay claim to any more than my third? Or, to make the hypothetical case more nearly parallel to the one at bar, suppose that I have a large farm and a number of tenants, and to save trouble in writing, I draw up and sign, for all my tenants a general memorandum in these words: "No tenant of mine shall apply to his own use, from the grain he raises on my farm, a greater number of bushels than 2,500; but all surplus of such grain over that amount, shall be delivered into my granary. A committee appointed by me shall make such rules as may be necessary to carry into effect the provisions of this memorandum." What would be the evident duty of the committee under such circumstances? Would it not be plainly this, to make such rules as would "carry into effect" the provisions of the memorandum? Would it be in discharge of their duty if causing the delivery into my granary of anything more than the "surplus?" Would not any one who ever followed a furrow, or drove a team afield, readily understand the meaning of the memorandum? Would any court in Christendom venture to construe the memorandum in a different way than that I have indicated? Does it make any difference, in point of principle, that the memorandum treats of 2,500 bushels of grain and the constitution of 2,500 dollars? If the principle of construction of either instrument remains the same, then, of necessity, the result must be the same; in the one case the "surplus" in money going into the county treasury; in the other, the "surplus" in grain, into the landlord's granary. And there is no refuge from this result. The 24th section of the 6th article of the constitution, says in its conclusion: "The General Assembly shall pass such laws as may be necessary to carry into effect the provisions of this section."



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Does the Legislature "carry into effect" the 24th section, by enforcing its provisions "in all counties having a population of 40,000 persons or over," and by refusing to enforce such provisions in all counties possessed of a less population? The 24th section aforesaid, says the Legislature shall enforce the provisions of that section. That body, however, says, as to all counties possessing a certain population, we will yield obedience to the organic law; but in all others, we will do as we please about it; and yet this legislative nullification of the 24th section as to seventy-five one hundredths of the counties of this State, is held by my associates to "carry into effect" the provisions of that section. If such legislation carries into effect the 24th section, then, all I have to say is, that constitutional mandates sit lightly on legislative shoulders; and the words abrogate and nullify, should hereafter, by all lexicographers, be declared as synonymous of enforce and effectuate.

Again, "affirmative specification excludes implication." The expression of one thing, is the exclusion of another. (Dwarris on Stat., 655, and cases cited.) The framers of the constitution by expressly providing that "all surplus \* \* \* \* over that sum (\$2,500) \* \* \* shall be paid into the county treasury," must be supposed to have had the whole subject in mind, and to have intended that all money not "over that sum," should be retained by the clerk who earned it. Thus, in *Maguire v. State Savings Association*, (62 Mo. 344,) we held that the Legislature by specially mentioning and providing for interest on the land tax, must be presumed to have had in contemplation the whole matter of affixing penalties for failure to pay taxes at the appointed time; and therefore, intentionally negatived the accruing of interest on any species of property other than real, and that such presumption accorded well with the familiar maxim of frequent recognition in statutory construction; "*expressio unius exclusio alterius*." A similar ruling was made by us in *ex parte Snyder*, (64 Mo. 58,) where we held that the framers of the constitution by

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providing for the continued existence of such criminal courts as were "organized and existing," must be presumed to have had the whole subject under consideration, and to have intended to continue the existence of only such courts as answered to that description, i. e. were organized and existed. Applying the rule announced in both those cases, and indeed by all the authorities to the present one, there is little room left to doubt that the framers of the constitution of 1865, by merely specifying that "all surplus of such fees \* \* over that sum" (\$2,500) should be paid into the county treasury, intended by necessary and inevitable implication, that all money not "over that sum" should be retained by the official earning it. And, if I take into consideration the bare justice of the case, I can reach no different conclusion. Why should not the clerk of a sparsely populated county be as much entitled to the full meed of his labor as the clerk who, located in a county of abundant population, does no more? The work being the same, the pay also, in natural equity, should be no less. Whether then, I test the ruling sanctioned by my associates, by the rules of well settled construction, or resort to those of obvious fairness, I am for reversing the judgment.

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NORTH *et al.* v. WALKER'S ADMINISTRATOR, *Appellant*.

1. **Power of Administrator to obtain extension of Notes.** An administrator has the legal power to contract for the extension of the time of payment of a note executed by his testator, so long as it is not barred under the administration law.
2. **Laches of Creditors, WHAT IS NOT.** Where such contract is made, the creditor is not guilty of laches in not exhibiting and making application for the allowance of his claim against the estate within the term to which the payment has been extended, and the creditor cannot, therefor, invoke against him the statutory bar created by sections 2 and 6, article 4 of Wagner's Statutes.

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3. ———; SECTIONS 2 AND 6, ARTICLE 4, WAG. STAT., CONSTRUED. Where such a contract was made by the executor in good faith, and with the implied sanction of the probate court, and in the interest of the estate, and the creditor, in consequence thereof, was prevented from proving up his claim; and it appeared that, within four months after the testator's death, the creditor and executor appeared in the probate court and the executor waived service of notice, but the demand was not allowed for the reason that it was not then due, and that, within two years after publication of notice, the executor, at the instance of the creditor, filed the deed of trust describing the said note and the interest notes, which latter were paid by the executor, and filed with the papers of the estate as vouchers, with the approval of the court, and that the creditor brought suit upon the note in the circuit court within two months after the expiration of the extended time; *Held*, that there was a substantial compliance with sections 2 and 6, article 4, Wag. Stat., in regard to the exhibition and application for allowance of the claim against the estate.
4. **Interest.** Where a note called for ten per cent. interest after maturity, and the time of payment was extended by agreement for a certain time at the rate of nine per cent.; *Held*, that after the expiration of the extended time the note would bear interest at the rate of ten per cent.

*Appeal from St. Louis Court of Appeals.*

The decision of that court is reported in 2 Mo. App. 174.

*John M. & C. H. Krum* for appellant.

1. The statute of limitations pleaded by appellant bars the right of respondents to a judgment in this case. Letters testamentary were granted December 10th, 1868. Publication of notice to creditors of the grant of these letters was made December 17th, 1868. The note sued on, by its terms, became due March, 1870. This suit was begun April, 1872, more than two years after the note became due. Prior to the institution of this suit, the note had never been exhibited as a claim or allowed against Walker's estate. Wag. Stat., p. 86, Sec. 19; Wag. Stat., p. 102, §§ 2, 4, 5, 6 and 8; *Wiggins v. Lovering's Admr.*, 9 Mo. 262; *Montelius v. Sarpy*, 11 Mo. 237; *Tevis v. Tevis*, 23 Mo. 256; *Richardson's Admr. v. Harrison, Admr'x*, 36 Mo. 96.

2. An administrator cannot, in any case, waive the statute of limitations, and suffer a claim to be allowed which is barred by the statute.

3. An administrator cannot, himself, admit or allow a claim against the estate he represents. All claims against an estate must be exhibited and proved by the methods, and in one of the courts prescribed by statute. No court can admit or allow a claim against an estate, except on proper proof.

4. There are but two methods provided by law for the allowance of claims against the estates of deceased persons. 1st. By serving on the administrator a notice in writing, stating the nature and amount, and a copy of the instrument or account upon which the claim is founded; 2nd. Bringing suit on the demand in some court of record. Wag. Stat., Art. 4, §§ 4, 5 and 8, p. 102, and § 15, p. 104. No demand can be allowed unless the claimant first makes oath that he has allowed the estate for all payments and offsets to which it is entitled. Ib. § 12. The clerk of the court shall keep an abstract of all demands established, showing their amount, date and class. Ib. § 26. No claimant can avail himself of the benefit of the notice given under the 5th section, unless he present his demand to the court in the manner provided by law for allowance, within three years after the granting of letters. Ib. § 26.

5. It is the policy of the laws of Missouri, pertaining to probate administration of estates, that they shall be speedily settled and distributed. Even provision is made for the allowance of claims not yet due, (by making a rebate) so that they may be classed in the 5th class.

6. As the note was never proved and allowed before this suit was brought, the vital question is, was the debt exhibited in such way, form and effect as to prevent the statute of limitations from running against it. It is not sufficient for the claimant to inform the administrator that he has a demand against the estate, and stop there, and allow more than two years to elapse before moving

again. True, it appears in this case that the administrator admitted that he knew the claim was right and valid, still as the administrator himself could neither admit or allow the claim against his intestate's estate, and as the claim was not, in fact, proved and allowed, the whole proceeding amounted to nothing, and the claim remained neither approved nor allowed. Nor was it sufficient to produce the note before the judge of probate, notice and all objection having been waived by the administrator. The claim of plaintiff remained unproved and not allowed, more than two years before this suit was begun, and more than three years elapsed after the granting of letters before this suit. Thus, it is shown, that notwithstanding the administrator waived notice (as he was authorized by statute to do, § 17), the claimants in the prosecution of this suit can have no benefit of their notice to the administrator because more than three years elapsed after the granting of letters before this suit was begun.

7. The Court of Appeals assumed that the act of the executor extending the time of payment of the note was beneficial to the estate, but there is no proof whatever in the record that such was the case; and is immaterial whether it was or not. The executor had no power to grant the extension.

8. The judgment of the Court of Appeals is excessive, because that court computed ten per cent. interest on the note instead of nine, from its maturity.

*Davis, Thoroughman & Warren, for respondents.*

1. The evidence shows that the claim was exhibited to the executor under section 5 of the administration act, and the executor with the approval of the court, having prevented the allowance, by the agreements for extension, is estopped from availing himself of the limitation of Sec. 6, of the same act. That the executor himself applied for the indulgence granted is sufficient to take the claim out



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of the statute. *Calanan v. McClure*, 47 Barb. (N. Y.) 206; *Cartwright v. Greene*, Ib. 479; *Harrison v. Jones*, 33 Ala. 258; *Puckett v. Janus*, 2 Humph. (Tenn.) 565; *Cheeseman v. Kyle*, 15 Ohio 15; *Herman on Estoppel*, §§ 418, 420; *Wells v. Miller*, 45 Ill. 33.

2. The executor had the power to make the agreements for extension. *Smarr v. McMaster*, 35 Mo. 351; *Kee v. Kee*, 2 Grattan 116, 128; *Boyd v. Ogelsby*, 23 Gratt. 674; *Williamson v. Anthony*, 47 Mo. 299; *Williams on Executors*, 1196; W. S., p. 74, § 29.

3. The claim was substantially exhibited within the meaning of the law, under §§ 15, 16 and 17, of the act, (W. S., p. 104,) within two years after letters granted; and the subsequent delay in establishing it does not prejudice the right of recovery. *Tevis v. Tevis*, 23 Mo. 258; *Williamson v. Anthony*, 47 Mo. 300; *Wells v. Miller*, 45 Ill. 33; *Wile v. Wright*, 32 Iowa 451; *Stiles v. Smith*, 55 Mo. 368. A substantial compliance with the statute is all that is required. *Gansevort v. Nelson*, 6 Hill 389; *Wells v. Miller*, 45 Ill. 33; *Mason v. Tiffany*, 45 Ill. 392; *Johnson v. Corbett*, 11 Paige 265; *Cheeseman v. Kyle*, 15 Ohio 15; *Flinn v. Shackelford*, 42 Ala. 202; *Boyd v. Ogelsby*, 23 Grattan, 674.

NORTON, J.—This suit was instituted in the circuit court of St. Louis county, on the 30th of April, 1872. It is founded on a note dated March 14, 1867, for \$24,000, payable to plaintiffs three years after date, and executed by one Isaac Walker, with interest at ten per cent. after maturity.

It is alleged that said Walker died in October, 1868, leaving a will in which Thomas A. Walker was appointed executor, to whom letters testamentary were duly issued by the probate court of St. Louis county, on the 10th of December, 1868; that the said Isaac Walker, in his life time, to more effectually secure the payment of said note, executed to plaintiffs a deed of trust to certain property in St. Louis county, from the proceeds of the sale of which plaintiffs, on the 18th of April, 1872, received the sum of \$17,226.-

21; that all interest on said note up to September 14th, 1871, had been paid, and that the balance was due and unpaid. The answer of defendant sets up that letters testamentary were issued to defendant on the 10th of December, 1868, and that on the 17th day of said month, he gave the required statutory notice that letters testamentary had been granted him, and that all creditors should present their claims for allowance within two years, &c.; that the note in question was not exhibited nor allowed by the probate court, and that no suit was brought thereon within two years after the publication of said notice. It was further alleged that said note had not been exhibited or proved, and that no suit had been brought thereon within three years after the publication of said notice.

To this answer plaintiffs filed a replication in substance as follows: 1st. They admit that the note sued on was not presented for allowance or allowed in the probate court, and that no suit was brought on it within two years after the executor had published his said notice; but the plaintiffs allege that said note was exhibited to the executor within two years after granting of his letters, and within two years after he published his said notice, and within two years after the note became due, and that suit was begun on the note within three years after the note became due. 2nd. The plaintiffs allege that the note in question was exhibited to the executor within two years after letters were granted to him, and that this suit was begun within three years after the note became due. 3rd. That the plaintiffs and executor on February 8th, A. D. 1870, entered into a written agreement, by which the time of payment of said note was extended to one year from March 14th, 1870, the executor agreeing to pay nine per cent. interest on the note during the extended time. It is also further alleged therein that a similar agreement in writing was made on the 28th day of February, 1871, whereby the time for the payment of said note was extended another year from March 14th, 1871, to March 14th, 1872.

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that both these agreements were filed in the St. Louis probate court, with the papers of the estate of said Isaac Walker; that under said agreements they were not bound to present said note for allowance within two years after notice, nor to sue on the same within three years from the publication of the executor's notice. A demurrer was filed to so much of the replication as set up the agreements to extend the time of payment of said note from March, 1870, to March, 1871, and to March, 1872. The cause was tried by the court and a judgment rendered for defendant, which was, by the general term, affirmed, from which plaintiffs appealed to the St. Louis Court of Appeals, where, upon a hearing, the judgment was reversed, and judgment rendered for plaintiffs for the balance due on their note, from which judgment defendant has appealed to this court.

On the trial, at defendant's instance, the court gave an instruction to the effect that, if the executor duly published in December, 1868, the statutory notice of the grant of letters testamentary to him, the plaintiff's claim was barred by the statute. The question decisive of this case, and presented by the record for our determination, is whether the facts disclosed in the evidence warranted the court in giving the above declaration of law. The proper determination of it involves a careful examination of the evidence, and, from it, it appears that this suit was commenced in April, 1872, on a note executed by the decedent for \$24,000, dated March 14th, 1867, payable three years after date, with interest from maturity, at 10 per cent.; that, at the time of its execution, six notes were executed for interest on the principal sum, at the rate of eight per cent., payable in six, twelve, eighteen, twenty-four, thirty and thirty-six months; that, to secure both the principal and interest notes, Walker, the maker, executed a deed of trust on certain real estate in the city of St. Louis. Walker died in October, 1868, and letters testamentary were granted on his estate on the 10th of December, 1868, and the re-

quired statutory notice of the granting thereof was duly published on the 17th of December, 1868. Thomas B. North, one of the plaintiffs, testified as follows: that about four months after Walker's death, he showed the notes and deed of trust to the executor, and had a conversation with him in regard to them. He said he knew all about the claim, and that it was all right; that he did not know whether it was necessary for the notes to be presented to the probate court or not, but that he admitted the claim as valid, and would appear and waive all objections and notice if witness would present them; that he took the note to the probate court for allowance in open court, and the executor waived all objections and the judge of the court said that it was valid, but that it was unnecessary to make a formal allowance, as the debt was not then due; that the interest notes were paid by the executor as they became due; that, early in the spring of 1872, the executor called upon him in regard to the note and said that it would soon mature, and he wanted to arrange for its payment; that property was then low, and he did not want it sacrificed under the deed of trust; that the claim was just, and he wished to procure an extension for the benefit of the estate for one year from maturity; that at his request the written agreement of February, 1870, was made, and was by him filed in the probate court; that, at the request of witness, the executor procured and filed a certified copy of the deed of trust on the 24th of March, 1870; that the property was sold under the deed of trust on the 18th April, 1872, and realized \$17,226.21, which was credited on the note, and that the balance was due; that, but for the solicitation of the executor and his written agreement, he would have formally exhibited and proved the claim against the estate within two years after letters testamentary were granted. The evidence also shows that the original interest notes were paid by the executor, and also two or three of the interest notes, under the agreements of 1870 and 1871, extending the time of payment of the note,

and receipts therefor filed by him with the papers of the estate in the probate court. Under the agreement of the 8th February, 1870, signed by the executor and plaintiffs, the time for the payment of the note was extended to the 14th March, 1871, and, under a similar agreement made the 28th February, 1871, the time of payment was extended to the 14th March, 1872.

It is argued by defendant's counsel that the executor had no power to make the said agreements, and that notwithstanding the facts shown by the evidence the bar of the statute created by Sec. 2 and Sec. 6, 1 Wag. Stat., 102, applies and prohibits a recovery for plaintiffs.

The question then arises, had the executor the power to make the agreements read in evidence, extending the time for the payment of the note after it matured, and if so, what was their effect. This question we think is answered by the case of *Smarr v. McMaster*, 35 Mo. 351. In that case McMaster was the security of one Schnitter on a note payable to Smarr. After the death of McMaster, the note was presented as a claim against his estate. The administrator resisted its allowance on the ground that after the death of McMaster Smarr agreed with Schnitter to extend the time of payment of the notes, Schnitter executing to Smarr a deed of mortgage as a further security. On the trial, Smarr offered to prove that the administrator of McMaster consented to this agreement. This evidence was rejected by the trial court on the ground that the administrator had no power to enter into the agreement and thus bind the estate. The judgment was by this court reversed, because of the rejection of that evidence, and it was expressly held that the administrator, under the general authority given him to preserve the estate, had the power to consent to the extension. It is argued that that case has no application here, "because the question there was whether the administrator in consenting that the creditor should give further time, discharged the security." This, we think, is

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a misapprehension. The agreement between Smarr and Schnitter to extend the time of payment, in law, had the effect to discharge Schnitter's security from any further liability on the note, unless it was made with the consent of the surety. McMaster, the security, could not consent to it, because he was dead when it was made; his administrator did consent to it, and the question before the court was not as to the legal effect of such consent, but whether he had the power to give his consent at all, so as to bind the estate of McMaster. The court decided that he had this power, and the legal effect of its exercise by him was to bind the estate to the payment of a debt, which but for its exercise would have been exempt. The court appears to have decided this as a mere naked, legal proposition, without reference to the consideration as to whether such agreement was advantageous or otherwise, to the estate. It does, however, appear in the case that the principal debtor, Schnitter, gave additional security by mortgage on land, which decreased the probabilities that the estate of McMaster would suffer loss, inasmuch as such additional security would have inured to the benefit of the estate, in the event of its being charged with the payment of the original debt.

In the case before us the inducement to the agreements, as shown by the evidence, was to prevent a sacrifice of the property conveyed by the deed of trust. This is shown by the fact that the executor applied for the extension for the reason as stated by him, that property was low, and if sold at the maturity of the note, it would be sacrificed, that the extension was granted, the executor agreeing to pay nine per cent. interest in semi-annual payments, which was one per cent. less than the note bore on its face after maturity. The evidence does not show that there was any money in the hands of the executor applicable to the payment of this demand, and does show that the agreements extending the time of payment were made in good faith, and with the sanction of the probate court, as implied from the fact

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that they were filed in the office of the court, as well as the receipts for the payment of interest growing out of them. The agreements were not entered into for the purpose of reviving an extinct claim, or creating a liability where none existed before, for at the time they were entered into the demand of plaintiffs was perfectly valid, and the liability of the estate to its payment undisputed. The demand could then have been enforced, and would have been according to the evidence, but for these agreements, the effect of them being not to create a new obligation, but simply to extend the time within which a debt, then in full vitality might be discharged. That an executor or administrator cannot revive a demand against an estate which has once been barred under the administration law, is unquestioned. The question in this case involves no such principle, but simply whether the executor could rightfully make an agreement, whereby the time for payment of an existing demand was extended. That he could do so is settled by the case of *Smarr v. McMaster*, *supra*.

If then, under the law, these agreements could be made, and were in fact made, and if, under the evidence, the plaintiffs in consequence thereof were prevented from proving up their claim within two years after publication of notice, or within three years after grant of letters, it is difficult to perceive on what principle laches can be imputed to plaintiffs and defendant allowed to interpose the statutory bar of either two years under Sec. 2, or three years under Sec. 6, Wag. Stat. 102, especially when the evidence shows that in four months after Walker's death, plaintiffs and the executor appeared in the probate court, and the executor waived service of notice and the demand was not then allowed, because it was not due; and also further shows that on the 24th of March, 1870, within two years after the notice was published, the executor, at the instance of plaintiffs, filed in the office of the probate court a certified copy of the deed of trust in which both the principal note and the interest notes were

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described, and that these interest notes were paid by the executor, and filed with the papers of the estate, with the approval of the court, as vouchers.

These facts, connected with the further facts that the agreements for the extension of payment were made to  
3. — : sections 2 and 6, Art. 4, Wag. Stat. prevent a sacrifice of the property, and that the note after maturity bore 10 per cent. interest, and that, by virtue of the agreements, the rate of interest was changed from 10 per cent. to 9 per cent., from the 14th March, 1870, to the 14th March, 1872, thus diminishing the interest to the extent of 1 per cent. during that period, amount to a substantial compliance with the law and brings it within the principle decided in the case of *Williamson v. Anthony, Admr.*, 47 Mo. 299. There an administrator having a demand against the estate of which he was administrator, presented the same to the probate judge, who, without appointing, as the statute required, some suitable person to defend, allowed the claim. Four years afterwards, the error was discovered, the matter was then again brought before the court, and the statutory bar of two years was interposed as a defense. It was there held that common justice required that the original irregular proceedings should be considered as amounting to such exhibition and application for allowance, as to prevent the statute from being interposed as a bar; that, while men must be held responsible for their ignorance of the law, and will not be excused in disregarding its provisions, still their errors, while acting in good faith, will be viewed with liberality, and a substantial compliance be held sufficient. These authorities seem to dispose of the questions in this case, and under them we cannot perceive how the Court of Appeals could have reached any other conclusion than the one it did.

That court, after reversing the judgment of the circuit court, rendered final judgment for plaintiff, calculating interest at 9 per cent. till the 14th March, 1872, after which it was calculated at 10 per cent. The

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interest, we think, was computed on the proper basis, as, under the agreement between plaintiffs and Walker's executor, the rate of interest, till then, was stipulated to be 9 per cent. This agreement only operated as a temporary suspension of the rate specified in the note, and when that time expired, the rate named in the body of the note, furnished the true rule for computing it.

The judgment of the Court Appeals, in reversing the judgment of the circuit court, and in rendering final judgment for plaintiffs, is affirmed, with the concurrence of the other judges.

AFFIRMED.

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STRICKLER *et al.*, Appellants, v. TRACY.

1. **Final Judgment; APPEAL.** In a suit for dower, a judgment that plaintiff should be endowed of a certain interest in specific real estate during her natural life, and that she should have and recover of defendant her costs, and have execution thereof, is not a final judgment, and from such judgment no appeal will lie.
2. **Dower: PRACTICE.** Where an agreed statement shows that dower in kind cannot be assigned, the appointment of commissioners for the admeasurement of dower is unnecessary; nevertheless the yearly value of the dower must still be ascertained.

*Appeal from Holt Circuit Court.*—HON. HENRY S. KELLEY,  
Judge.

*Collins & Dugan* for appellants.

*Woodson* for respondent.

SHERWOOD, C. J.—Mrs. Strickler claimed and sues for dower in a certain lot in Mound City, her present husband being joined with her as co-plaintiff. The case was tried on an agreed state of facts, whose statements are made with little regard to precision, and are, in some particulars, in flat contradiction of each other. The court seems to have acted on an express admission that "the female plaintiff relinquished all of her dower in said tract of land,

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except in and to the one-eighth part thereof, retained by her husband, &c.;" and a finding was accordingly made "that plaintiff, Catherine E. Strickler, is entitled to and endowed with a dower interest of one undivided third part during her natural life, of the undivided eighth part of the real estate described in plaintiffs' petition, to-wit: Lot one, (1) in block two, (2) in the town of Mound City, Holt county, Missouri, without taking into consideration the improvements put upon the same by the defendant, and that the said tract or lot of land is not susceptible of division without great injury to the defendant, and dower in kind cannot be assigned. Wherefore it is ordered adjudged and decreed by the court that the said Catherine E. Strickler be endowed of the undivided one-third part during her natural life, of the undivided one-eighth part of lot one, in block two, of the town of Mound City aforesaid, and that plaintiffs have and recover of defendant their costs in this behalf incurred and expended, and that they have execution therefor."

This judgment, though in accordance with the statute, (1 W. S., §27, p. 543,) and good so far as it goes, is not a final judgment, but merely an interlocutory one, and is similar in this respect to one, that partition be made, *McMurtry v. Glascock*, 20 Mo. 432. 2 W. S., § 12, p. 968. It is quite obvious that although the widow is declared entitled to dower, and the proportion thereof, yet she is left in the same situation as though she had brought no action. The sections subsequent to section 27 *supra*, as well as the decisions of this court, furnish a guide as to the proper course to be taken.

The yearly value of a widow's dower must be ascertained, and this regardless of the fact that the land is not susceptible of division. (§ 31.) The agreed statement ascertains this insusceptibility, and this was sufficient, without the appointment of commissioners. Inasmuch as there is no final judgment the appeal will be dismissed. All concur.

APPEAL DISMISSED.



CITY OF LOUISIANA V. MILLER, *Plaintiff in Error.*

1. **Street Improvements.** The engineer of a city which has power by its charter to provide by ordinance for the construction and repair of sidewalks, has no authority to order a sidewalk to be built without an ordinance.
2. ———: NO PERSONAL JUDGMENT can be rendered against the owner of real estate for street improvements, made in front of his premises by the city (*following St. Louis v. Allen*, 53 Mo. 44).

*Error to Louisiana Court of Common Pleas.*—HON. GILCHRIST PORTER, Judge.

*Morrow & Gray* for plaintiff in error.

*T. J. C. Fagg* for defendant in error

HOUGH, J.—This was an action instituted before a justice of the peace to recover of the defendant the cost of building a sidewalk in front of his premises in the city of Louisiana. On appeal to the Louisiana court of common pleas the plaintiff recovered a personal judgment against the defendant and his sureties in the appeal bond. The work was done under a contract made by the street commissioner of the city, acting under instructions from the city engineer. The city has power, by its charter, to provide, by ordinance, for the construction and repair of all sidewalks; but the charter does not confer upon the city engineer authority to cause sidewalks to be built at his pleasure. No ordinance having been introduced in evidence authorizing the city engineer to direct the work in question to be done, the court erred in giving judgment for the plaintiff. Besides no personal judgment can be rendered against the defendant in such cases. *City of St. Louis v. Allen*, 53 Mo. 44; *Seibert v. Allen*, 61 Mo. 488. The judgment of the common pleas court must therefore be reversed, and the cause remanded. All concur.

REVERSED.

EDWARDS *et al.*, Appellants, v. THOMAS.

1. **Partnership; DEATH OF PARTNER.** Death, ordinarily, accomplishes the dissolution of a partnership; but it is otherwise when there is an express stipulation to the contrary in the articles of copartnership.
2. **Agency: POWERS OF CASHIER AND FINANCIAL AGENT.** One who is authorized to act as cashier and financial agent of a firm which is in the habit of taking commercial paper in the transaction of its business, has authority to endorse such paper in the name of the firm.
3. **Scope of Agency, HOW SHOWN.** The authority of an agent to act in a given manner, may be inferred from the mere fact and nature of his employment, or from long continued and repeated acts of acquiescence by his employer.
4. **Unauthorized Accommodation Paper: RIGHTS OF PURCHASER: NOTICE.** As against a purchaser of negotiable paper endorsed by an agent in the name of his principal, it is no defense that the endorsement was made, not for the benefit of the principal, but for the accommodation of a third party, unless the purchaser took with notice of that fact. Positive and direct testimony is not necessary to charge him with notice; it may be inferred from facts proven; but mere circumstances sufficient to put a prudent man on inquiry will not do. The fact that the name of the party accommodated appears on the paper as last endorser does not, as matter of law, impart such notice.
5. **Statements of Agent.** Third persons have a right to rely upon the statements of an agent as to the existence of such extrinsic matters relating to his agency as lie within his own peculiar knowledge.
6. **Notice of Protest.** It is the duty of the holder of dishonored paper to direct the notary where and to whom to send notice of protest; and if one holding such paper endorsed by a firm, knows that the former manager of the business of the firm has been displaced by another, but fails to inform the notary of the change, and the notary gives notice of protest to the former manager at the old place of business, as he had done on a previous occasion, such notice is insufficient to bind the firm, notwithstanding the failure of the new manager to give notice that the business of the firm is no longer conducted at that place, and to remove the old sign of the firm.

*Appeal from St. Louis Court of Appeals.*

The principal defense relied on was that Drew had endorsed the note sued on in the name of the Dock Company for the accommodation of T. P. Morse & Co., without the

In accommodation  
see p 475

knowledge or consent of the company. Among the declarations of law prayed by the plaintiff and refused by the court, were the following:

6. If the court, sitting as a jury, finds that the plaintiffs purchased the note sued on, or the original note of which the former was a renewal, of R. M. Renick & Co., brokers, into whose hands the general financial agent in charge of the business of the Sectional Dock Co., a partnership of which defendants were members, had placed the same for discount, relying upon representations made to them by said brokers, that the proceeds of the note were intended for the benefit of the said Sectional Dock Co., the court declares that it is immaterial for the purposes of this action whether said representations were true or false; and that the defendants are bound by said representations, whether true or false.

10. If the court, sitting as a jury, finds from the evidence that the defendants were members of the firm of the Sectional Dock Co. in the petition mentioned; that said firm, by its general financial agent, occupied or used conjointly with the firm of T. P. Morse & Co., an office at the corner of 3rd and Olive streets, in St. Louis, Missouri, and had so done for a long time prior to the making of the note sued on, and continued so to do for a considerable time afterwards, and until the time of the appointment of Daniel G. Taylor, as administrator of said firm estate of the Sectional Dock Co., and had signs at said office indicating the same as its place of business, which signs were known to the said administrator to be there after he was appointed, but were not removed by him and remained at said office until after the maturity of said note; that said administrator did not set up at said office any sign indicating a removal of said office of the Sectional Dock Co., nor did he indicate in his published advertisements of his appointment, nor in any other public manner, the place where he kept his office for the business of said company; that the said notary who protested the note sued on, had previously

gone to the same office to present a note of which the Sectional Dock Co. was maker, and had there been directed to the place where he might find the financial agent of the company dining, and having gone to the place indicated, he presented the note to said agent, and it was paid; that the notary had no notice of the removal of the office of said Sectional Dock Co., from said office, and did not know that said financial agent was no longer such; that during business hours on the day of the maturity of the note sued on, the notary left notice of the dishonor of said note at said office with the person who had been previously the financial agent of said company, and, as such, had endorsed said note with the addition of his name as such agent, and who was then found by said notary in said office in charge thereof; then the court declares the law to be, that such service of the notice of the dishonor of said note is sufficient, notwithstanding the fact that said administrator had previously qualified as administrator of said company, and was then carrying on the business thereof as such, and said former agent had no power or authority to act for said company, and the business of said company was then in fact, but without the knowledge of said notary, conducted at another and different office in said city, than said office at Third and Olive streets.

Among the declarations of law prayed by defendants, and given by the court, were the following:

1. The defendants are not liable in this action, unless the court finds from the evidence, that they, together with John D. Daggett, Ann Eliza Hartshorn, wife of Saunders W. Hartshorn, Robert C. Rogers, executor of Patrick Rogers, constituted the firm, or copartnership known as "Sectional Dock Company," as alleged in the petition.

3. The power or authority from the "Sectional Dock Company" to Charles Drew, Jr., to endorse the name of said company upon the note sued on, cannot be implied from the employment of said Drew as financial agent and

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cashier of said company, nor from the character and course of business which said company intrusted to his management and control, and the plaintiffs when they took said note were by the face of said endorsement put to inquiry as to the authority of said Drew to make said endorsement.

4. No written power or authority from the "Sectional Dock Company," authorizing or empowering Charles Drew, Jr., to endorse the name of said company on the note in question, having been shown, the authority or right to make said endorsement, cannot be implied from the employment of said Charles Drew, Jr., as financial agent and cashier of said company, nor from the character and course of business which said company intrusted to his management and control.

13. If it is found from the evidence in the case, that the note in suit, was discounted or sold for the benefit and accommodation of T. P. Morse & Co., and that Charles Drew, Jr., had no authority from the Sectional Dock Company to endorse their name on notes for the accommodation of said Morse & Co., and that there were such circumstances attending the making, endorsement and sale of said note, known to the purchasers or their agent, as should have put prudent men on inquiry whether or not said Drew was authorized to make such endorsement in the name of said company, then the court is requested to declare the law to be that defendants are not liable.

Plaintiffs excepted to the giving and refusing of these instructions.

*John G. Chandler* for appellants.

1. The facts from which the partnership was to be inferred were undisputed. Defendants were partners. Coll. on Part., §§ 601, 603.

2. If anything is well established in law, it is that the authority of the agent may be proved by implication.



2 Greenl. Ev., §§ 60, 61; Story Agency, §§ 45, 50; *Cobb v. Lunt*, 4 Greenleaf 503; *Dows v. Greene*, 16 Barb. 72.

3. Although a general authority to endorse was proved by overwhelming testimony, and then admitted at the bar, the court held that there was no evidence of authority to endorse the note in suit. That is, the plaintiffs were bound to prove by writing the authority of the agent to endorse either the identical note in suit, or notes to be used for the identical purposes for which that was used by the agent. Neither of these propositions has any legal support. Story on Agency, § 73; *North River Bank v. Aymer*, 3 Hill 262; *Farmers' Bank v. Butchers' Bank*, 14 N. Y. 624; *Smith v. Clark Co.*, 54 Mo. 58, 77; 1 Parsons on Notes and Bills, 108; *Exchange Bank v. Monteath*, 17 Barb. 171; *Bank v. Macleod*, 7 Moore P. C. 35; *Bank v. Fagan*, 7 Moore P. C. 61.

4. The note was endorsed in the name of the company, with the addition of the agent's name and official designation. This constituted a representation upon the paper itself, that it was endorsed in the business and for the benefit of the principal. So endorsed, it was put, by the general agent of the company, into the hands of the brokers for discount; they offered it to plaintiffs expressly declaring that it was for the benefit of the company, and plaintiffs relying upon those representations bought it. They had a right to so rely, and defendants are bound by the representations, whether true or false. 3 Hill 67; *Farmers' Bank v. Butchers' Bank*, 14 N. Y. 623; *Exchange Bank v. Monteath*, 26 N. Y. 505; *New York R. R. v. Schuyler*, 34 N. Y. 30; *Westfield Bank v. Cornen*, 37 N. Y. 320; *Bird v. Daggett*, 97 Mass. 494; *Madison R. R. v. Norwich Sav. Soc.*, 14 Ind. 457; *De Voss v. Richmond*, 18 Gratt. 338; 2 Kent Com. (12th Ed.) 621, note; *Fairlie v. Hastings*, 10 Ves. 125; 1 Phil. Ev. (5th Am. Ed.) 507, 508, 516; *Perkins v. Burnett*, 2 Root 30; 1 Greenl. Ev. §§ 27, 207, 208; Kerr on Fraud and Mist. 111; *Wilson v. Fuller*, 3 Q. B. 68, 77; Broom Leg. Max. 755.

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5. The evidence shows that so far from plaintiffs having notice of any intended misapplication of the proceeds of the discount, all the facts and circumstances attending the negotiation tended to prevent suspicion. Notice means knowledge, and that of some distinct fact showing that Drew had misapplied, or intended to misapply, the proceeds. We look in vain for such a fact brought to the knowledge of plaintiffs. *Horton v. Bayne*, 52 Mo. 531; *Lemoine v. Bank*, 1 C. L. J. 529; *Hamilton v. Marks*, 63 Mo. 167; *Collins v. Gilbert*, 94 U. S. 753. These cases establish the rule that the evidence must show actual notice, not merely suspicious circumstances.

6. The notice of protest was sufficient. Drew had for years and notoriously been the general financial agent of defendants' firm. The office at Third and Olive streets had for years, and notoriously, been a place of business of defendants' firm; and continued to be held out to the world as such until after the service of the notice of protest. Taylor knew that this office had been used as an office of the firm, and that there were signs there indicating it as such, yet when he was appointed he neither removed the signs, nor put up any sign at the office showing that it was no longer to be used by defendants' firm, or by him—nor did he state in the advertisement of his appointment either where the place of business was to be, or that Drew had been removed from his agency. The notary knew this to have been the place of business of the firm, knew of no other, and had previously, in his official character, presented a note of the firm at the same place. He states that he knew of no change either in the office or the agency. As to the latter point only, the removal of Drew, the defense attempted to contradict him. The defendants themselves took no steps whatever to inform the world of the removal of the office or the agent. Reasonable diligence in serving the notice is all that is requisite. The holder is not bound to see to it that the notice is brought home to the party. *Bank v. Lawrence*, 1 Pet. 578; *Lewiston*

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*Bank v. Leonard*, 43 Me. 157; *Sanderson v. Reinstadler*, 31 Mo. 483; 1 Pars. Notes and Bills, 477; *Edson v. Jacobs*, 14 La. 494; *Williams v. U. S. Bank*, 2 Pet. 96; *Jones v. Mansker*, 15 La. 51; *Com. Bank v. Gove*, Id. 113; *Lord v. Appleton*, 15 Me. 270; *Bank v. Merle*, 2 Rob. La. 117; *Jacobs v. Town*, 2 La. Ann. 964; 1 Pars. Contr. 71; 1 Greenl. Ev. § 41; *Hazard v. Treadwell*, Stra. 506; *Spencer v. Wilson*, 4 Munf. 130; Story on Part., Sec. 16; *Pope v. Risley*, 23 Mo. 186; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 59; Edwards on Bills and Notes, 612 (2nd Ed.); *Bank v. Phillips*, 3 Wend. 408; *Bank v. Davidson*, 5 Wend. 537, 587; *Union Bank v. Govan*, 10 Sm. & M. 334; *Lewiston Bank v. Leonard*, 43 Me. 144, 157; *Cocke v. Bank*, 6 Humph. 51; *Dabney v. Stidger*, 4 Smedes & M. 749; 1 Pars. on Notes and Bills, 502; Edwards on Bills and Notes, 631, (2nd Ed.); Story on Prom. Notes, Sec. 310; *Fourth Nat. Bank v. Heuschen*, 52 Mo. 207.

*D. T. Jewett and J. M. Krum* for respondents.

The note in the present case was not signed with the personal signatures of the parties as in *Hamilton v. Marks*. The signature by agent was notice upon the face of the paper, and brings the present case fully within the principal of *Goodman v. Simonds*, 20 How. 343, and *Fowler v. Brantley*, 14 Pet. 318. So does the endorsement by Drew as last endorser, which, as the evidence shows, indicated that the discount was for his benefit. Other facts were also known to plaintiffs, or the go-between, Renick; they knew the business of the Dock company, that these were not business notes of that company, that they were made in a shape to suit purchasers, that when plaintiffs refused to take one \$6,000 note, but were willing to take two \$3,000 notes, Drew pulled the two notes out of his pocket ready made. They also knew of the firm of T. P. Morse & Co., and that Morse & Daggett, the makers of the note, were of that firm. Plaintiffs had no right to take Drew's state-

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ments as to what the money was wanted for, until they knew that he was the authorized agent of defendants. They were not justified in depending on such vague and unauthorized information, obtained in such a doubtful way. The face of the paper notified them that the last endorser was legally the beneficiary of the discount, and was an agent only, with what powers they did not know, and never inquired; and that he was pledging his personal liability to get the money; that T. P. Morse, a young man known not to be of the Dock company, was also on the paper; in short, that it was not the paper of the company. All this was not overcome by Drew's statement, that the paper was made for the benefit of the company.

2. The company was officially dead when the notice of protest was given, and the man, (Drew,) to whom it was given, had no connection with it. There is very little doubt that he never had authority to receive notice of protest personally. Story on Prom. Notes, § 309; Bailey on Bills, p. 274; Parsons on Notes & Bills, p. 500.

SHERWOOD, C. J.—This suit was brought by the plaintiffs, partners, as Edwards, Matthews & Co., against the defendants, Mary Thomas and Sarah L. Morse, as partners in a co-partnership known as the Sectional Dock Company, upon a promissory note, of which the following is a copy:

“\$3,000.

ST. LOUIS, March 19th, 1873.

“Four months after date, we promise to pay to the order of Sectional Dock Co., Three Thousand Dollars, for value received, negotiable and payable without defalcation or discount, and with interest from maturity, at the rate of ten per cent. per annum.

“THOS. P. MORSE,

“JOHN D. DAGGETT.”

Endorsed:

“SECTIONAL DOCK CO.

BY CHARLES DREW, JR., Fin. Agt.

“CHARLES DREW, JR.”

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The petition averred that the defendants, Mary Thomas and Sarah L. Morse, at the date of the note, were, together with one John D. Daggett, one Ann Eliza Hartshorn, wife of Saunders W. Hartshorn, and one Robert C. Rogers, executor of Patrick Rogers, deceased, partners, doing business under the firm name of Sectional Dock Company—said Eliza Hartshorn's interest in said firm being separate estate, and said John D. Daggett being her trustee. Then followed averments of the making and delivery of the note to the payee, the endorsements in succession, and the delivery for value to plaintiffs before maturity, due demand of payment, dishonor, and protest and notice to the endorser. The answers of the defendants separately put in issue all the allegations of the petition, except plaintiffs' partnership, and were verified by affidavit. The cause was tried by the court, and judgment rendered for the defendants, on appeal to general term, judgment affirmed, and also in the St. Louis Court of Appeals.

A partnership, under the name of the Sectional Dock Company, was formed some 30 or 40 years ago, for the purpose of carrying on the business of docking and repairing steamboats and other vessels, at St. Louis, and then consisted of John D. Daggett, Mary Thomas, Thomas T. Morse, Patrick Rogers and Ann Eliza Hartshorn, wife of Saunders W. Hartshorn, whose trustee was Rowland Ellis, Jr. In 1857 a partnership article was signed by the several partners, Rowland Ellis, Jr.'s name being signed by attorney, S. W. Hartshorn, husband of Mrs. Hartshorn. This article provided, amongst other things, "that in the event of the death of either party to the agreement, the co-partnership should not, on that account, be dissolved, but the interest of such deceased party should be continued and represented by the legal representative of such deceased party." In 1866, Thomas T. Morse died, and immediately thereafter his widow, the defendant, Sarah L. Morse, administered upon his estate, and then at the foot of the partnership article made and signed the follow-



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ing memorandum: "I approve and accept the above. Aug. 13th, 1866. Sarah L. Morse." Thereafter the business continued as before, Mrs. Morse representing her deceased husband's interest, and drawing the dividends. In the latter part of 1870, Patrick Rogers died at Cincinnati, Ohio, where he had resided, leaving a will, by which "he appointed his son, Robert C. Rogers, executor and trustee of his estate, and directed him to continue his, (testator's) interest in sundry enterprises, and, amongst others, in this Sectional Dock Company, at St. Louis, and that this interest be represented by the executor in his, (testator's) stead, until such time as in the executor's judgment it should be most advantageous to the estate to sell out or settle up and close his share." This will was duly proved at Cincinnati, and the executor qualified there, but the will was not then filed, or administration taken out in Missouri. But as directed by the will, Robert C. Rogers took charge of his father's interest in this company, participated in its management, and from time to time drew dividends. The relations of the partners continued unchanged, until in June, 1873, on the 10th of which month Robert C. Rogers also died. On the 9th day of June, 1873, a certified copy of Patrick Rogers' will was filed in the probate court of St. Louis county, Missouri, and on the 10th day of June, 1873, administration, with the will annexed, upon the estate here, was committed to Daniel G. Taylor. About the same time, John D. Daggett, Sarah L. Morse and Mary Thomas, executed a relinquishment of their right to administer upon the partnership, in which they describe themselves as the "sole surviving members of the co-partnership known as the Sectional Dry Docks Company, of St. Louis, residents of the State of Missouri," and consent that said Taylor should administer thereon. This paper was filed in the probate court, which on the 8th day of July, 1873, granted to Taylor authority to administer upon the partnership. About 1863, John D. Dag-

gett was substituted as trustee for Mrs. Hartshorn, and continued so until after the making of the note in suit.

The defendants denied that the facts above stated constituted them partners as in the petition alleged. The business of the Sectional Dock Company, for many years, was managed, not by the partners in person, but by a general agent appointed by them, and whom they designated sometimes secretary, and at others cashier and financial agent. For some years prior to 1867, William Daggett was this general agent, but in that year he was displaced, and Charles Drew, Jr., a son-in-law of John D. Daggett, was appointed in his place, and he continued in the management until the grant of administration upon the partnership estate to Daniel G. Taylor, on the 8th day of July, 1873. Drew's powers were very great; he kept the books of the concern, collected all the bills, took all the money and paid it out, kept a bank account at the First National Bank, and one at the People Savings Bank. The Docks frequently took in notes as part payment of bills, and Drew negotiated them. During the last two years of his administration, Drew signed checks, notes and other documents, for that company, as "financial agent," prior to that period as "secretary." Drew's name was frequently signed to checks and notes in both ways; and checks were given to Rogers, Hartshorn, Mrs. Morse, and John D. Daggett, by Drew, and these checks were signed with this designation; Drew always signed checks that way—the money could not be got if he did not; checks for Mary Thomas, were made out in the same way. The Dock Company were repairing and docking steamboats and barges, and vessels in the river. In the transaction of their business they took commercial paper, which was made payable to the St. Louis Sectional Dock Company; this paper was endorsed; and when endorsed, the endorsement was, "Sectional Dock Company, by Charles Drew, Jr., as secretary or financial agent," one or the other. The powers conferred upon Drew were extraordinary in this, that they were exclusive

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of the partners themselves. Mr. Morse, who was not only a son of one of the defendants, but had been in the employ of the company himself, says that none of the partners had a right to sign the name of the company, not Capt. Daggett, or any other partner; nobody but Drew.

The evidence also showed that Daggett, upon the removal of his son, and the appointment of Drew, had made the statement to the First National Bank's officers that Drew had full authority to transact all the financial business of the Sectional Dock Company, by endorsement, &c. A letter dated June 12th, 1872, at Cincinnati, from R. A. Rogers, shows also a similar recognition, as well on his part as that of Hartshorn of the financial agency of Drew. This letter even shows that Rogers was aware of and approved Drew's extension of accommodation to the firm of T. P. Morse & Co., and that Hartshorn was at least aware of such extension; Mrs. Morse, too, as late as February 26th, 1873, addressed a letter to Drew as "Financial Agent of Sectional Dock Company," referring to the concern as a partnership, to a dividend due her as a member of it, and signing her name as "administratrix." An instrument in the nature of a power of attorney was also offered in evidence, (held by the court defectively executed as to Mrs. Hartshorn,) as follows: "Know all men by these presents, That we, John D. Daggett, Sarah L. Morse, admx., Mary Thomas and Eliza Hartshorn, and Robert C. Rogers, exctr., partners in the Sectional Dock Company, of St. Louis Missouri, have made, constituted and appointed, and by these presents do make, constitute and appoint Chas. Drew, Jr., of St. Louis, Missouri, the true and lawful cashier and financial agent of said Sectional Dock Company, and in the name of the same to do and perform all and every act and thing whatsoever required and necessary to be done in the premises, as we might or could do if personally present—hereby ratifying and confirming all the said Charles Drew, Jr., as said cash-

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ier and financial agent shall lawfully do, or cause to be done by virtue hereof.

"In witness whereof, we have hereunto subscribed our names this 18th day of July, 1871.

Signed, "JOHN D. DAGGETT,  
"SARAH L. MORSE, Administratrix,  
"MARY THOMAS,  
"ANN E. HARTSHORN,  
"ROBERT C. ROGERS, Trustee  
of P. Rogers' Estate,  
"By S. W. HARTSHORN, Att'y in fact."

The paper was acknowledged by John D. Daggett, Sarah L. Morse and Mary Thomas, in St. Louis; and Mrs. Hartshorn, and S. W. Hartshorn, as att'y in fact for Robert C. Rogers, Cincinnati, as appears by the certificates attached. There was also appended the following, the execution of which was proved:

"Mr. S. W. Hartshorn is authorized to transact all business concerning St. Louis Sectional Dock Company, as far as my interest therein is concerned.

"ROBERT C. ROGERS,  
Trustee of P. Rogers' Estate."

It was further shown that Hartshorn had for years managed his wife's interest; that he drew dividends, attended meetings of the company, notably a meeting held at Mrs. Morse's house, in July, 1872, when all the interests were represented, there being present Mr. Hartshorn, Robert C. Rogers, Mrs. Thomas, Mrs. Morse, Capt. Daggett, Thos. P. Morse and Mr. Drew. He frequently came over from Cincinnati sometimes with, and sometimes without Rogers, to look after the management, and Thos. P. Morse testifies to sundry conversations had with him as to the company's business. Several letters of his and Rogers' were also read in evidence, showing his interest in the management as well as that of Rogers, and that Hartshorn recognized Drew as having the whole management of the business; letters were to the same effect. Much more evi-

dence of a similar sort was adduced, and finally defendants' counsel admitted that Drew was financial agent of the Sectional Dock Company, for all legitimate purposes of its business. The only purpose, it seems for which the just quoted instrument was admitted by the court, was "to establish the fact that these parties were dealing with this concern as a partnership," and not because the paper was regarded competent to prove authority conferred by the partnership upon Drew to execute and endorse notes.

I. Death, ordinarily, accomplishes the dissolution of a co-partnership. Provision, however, may be made against such a contingency as was done in 1. PARTNERSHIP: death of partner. the present instance, by providing in the articles that the interest of the deceased partner shall continue, and be conducted by the legal representative of the decedent. (Coll. on Part., §§ 601, 603; Sto. on Part., §§ 5, 195, 196, 199, and cases cited.) And if there were any option on the part of Mrs. Morse, in regard to acceptance of the provision referred to, (Sto. on Part., § 201), this option was exercised by her endorsement on the articles of co-partnership, as above shown. The proof of the partnership, and their holding themselves out to the world as such, is abundantly present throughout the record. And if any technical lack of authority is shown as to Mrs. Hartshorn in the execution of the partnership articles in 1857, or the written authority to Drew in 1871, this lack was otherwise supplied, for John D. Daggett was appointed trustee of Mrs. Hartshorn in 1863, and fully represented her interests, at least it was his duty so to do, and her husband, with the consent of her trustee, and with her consent, it must be presumed, drew dividends for her for years. But even if Mrs. Hartshorn was not thus represented, this would not limit or lessen the liability of those of the partners who were present, or properly represented, and who acted as partners, in the transaction of business and the reception of dividends under the name and style of the Sectional Dock Company. From the declaration given, the court



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below must have regarded the co-partnership established as to all the parties named in the petition.

II. And we regard the agency of Drew to transact the general financial business of the concern, as amply established. The words employed in the instrument above set forth, would, it would seem, readily bear no other signification. If "true and lawful cashier and financial agent of said Sectional Dock Company," would not necessarily import and impart authority to endorse notes, discount them, draw checks and make deposits, it is not a little difficult to see what their meaning would be. In *First National Bank v. Gay*, (63 Mo. 33,) we said: "If the father when stating 'that whenever his son wanted accommodation at the bank, he was authorized to use or sign his name,' did not by such language intend to confer authority for signing his name to a note or notes as security, it is impossible to give any meaning or force to his utterances. He must have meant to confer such authority if he meant anything. And it will not be assumed that the language of the father was a mere idle declaration. The law, therefore, will give effect to such evident intention, in the usual and ordinary manner in which such intention is commonly effectuated."

But leaving altogether out of view the written authorization, and having regard alone to the other circumstances already noted, and others of like sort, no trouble would be experienced in arriving at the conclusion that Drew was fully authorized to do that which he did for years, viz: Draw checks, endorse and discount notes, make and withdraw deposits, &c., &c. The power to do such acts arises, of necessity, from the duties devolved on him by his position, and the relations he bore to the company; and the fact that it was his custom to perform such acts for a series of years, with the evident knowledge and presumed acquiescence of the company for which he acted, was authority enough. Instances there are without number, to be found in books, where au-

2. AGENCY: powers of cashier and financial agent.

3. SCOPE OF AGENCY, HOW SHOWN.

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thority of an agent to act, in a given manner, follows by inevitable implication, from the mere fact and nature of his employment, or from long continued and repeated acts of acquiescence. (Story on Agency, §§ 45, 50, 54, 55, 56, 57, 58, 59, 60, 84, 85, 102, 103, and cases cited; *Ekins v. Macklish*, Ambler 184; 2 Greenlf. on Ev., §§ 60, 61, and cases cited; *Washington Mut. Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480, *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Hoyt v. Thompson's Extr.* 19 Id. 208; *Bank U. S. v. Dandridge*, 12 Wheat. 64; *Cobb v. Lunt*, 4 Greenlf. 503; *Dow v. Greene*, 16 Barb. 72.) The giving of any declaration, therefore, which required a written authority to support Drew's endorsement, and which denied that the power to thus endorse could be shown by implication, acquiescence or ratification, was plainly erroneous. Besides all that, as above seen, the authority of Drew, for all legitimate purposes of the partnership, was distinctly admitted at the trial.

III. We are thus led to consider the correctness of the declaration that the "plaintiffs, when they took said <sup>4. UNAUTHORIZED  
ACCOMMODATION  
PAPER: rights of  
purchaser: notice.</sup> note, were by the face of said endorsement put to inquiry as to the authority of said Drew to make said endorsement." When the trial of this cause occurred, the doctrine asserted in *Hamilton v. Marks*, (52 Mo. 78,) was in force. Since then, as is well known, that doctrine has been justly exploded by a more recent decision in the same case (63 Mo. 167). Under the last ruling, merely putting a party about to purchase negotiable paper upon inquiry is not *per se* sufficient; nor is gross negligence. There must be evidence of *mala fides*. As a matter of course bad faith is not to be established by direct evidence alone, but, like fraud, its congener, may be proven by indirect or circumstantial evidence. In *Goodman v. Harvey*, (4 Ad. & El. 870,) the drawee refused acceptance of the bill, and it was noted for non-acceptance, protested, and afterwards transferred to plaintiffs for value. On the trial, Lord Chief Justice Denman ruled that the

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plaintiffs, in purchasing the bill from Levy, with the notarial marks indicative of non-acceptance upon it, "received the bill with a death wound apparent on it," and was, therefore, guilty of gross negligence. Upon a case reserved, however, the same distinguished judge held that "gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case, as to the notarial marks, could only weigh as rendering it less likely that the bill should have been taken in perfect good faith." And accordingly, the rule *nisi* was made absolute.

A more rigid rule seems announced in *Fowler v. Brantly*, (14 Pet. 318,) and also in that of *Andrews v. Pond*, (13 Id. 65). In the former case the note was peculiar in form, not intended for outside circulation, and the figures 169, placed on the face of the paper, was common to rejected paper, in conformity to the custom of that particular bank, with which, under the special circumstances detailed in evidence, the purchaser must be presumed familiar, and hence he was held as apprised by the face of the paper of its antecedent infirmities. Whether so stringent a rule should prevail in respect of paper expressly intended for outside circulation, and not looking to negotiation in any particular bank, or to being subjected to any local or special custom, was not announced. In *Andrews v. Pond*, *supra*, the notarial marks on the bill would appear to have been the same, in effect, as those in *Goodman v. Harvey*, above cited, and it was held in *Andrews v. Pond*, that a person taking a bill thus dishonored, cannot claim the privileges allowable to a *bona fide* holder, any more than if taking one overdue. This decision is not readily reconcilable with the leading English case just referred to, which overthrew the case of *Gill v. Cubitt*, (3 B. & C. 466). But we have not been able to discover any striking parallelism between those cases and the one at bar. Here, the note

bore no symptoms or tokens of dishonor; no "death wound" apparent on its face; nothing in short which proclaimed *caveat emptor*. The declaration being considered was therefore doubly erroneous. Erroneous, because asserting that by the face of the paper the plaintiffs were put to inquiry; erroneous, because virtually assuming that being put to inquiry was tantamount to a defense. This declaration of law, No. 3, was of a piece with No. 13, also given for defendants, which gave recognition to the now repudiated doctrine concerning putting prudent men on inquiry. It is not to be denied that every circumstance attending the transfer of negotiable paper is to be weighed by the jury, under appropriate instructions; for although as above seen, nothing short of bad faith will invalidate the title of one purchasing for a valuable consideration, yet it is equally undeniable that gross negligence may be cast into the scale, as no insignificant weight in determining whether the paper was "taken in perfect good faith." (*Goodman v. Harvey, supra.*) Under this view, evidence was properly receivable, showing the custom of bankers to place to the credit of the last indorser the funds arising from the instrument discounted; that Daggett, one of the makers, was, to the knowledge of one of the plaintiffs, encumbering his property on the market, and tottering on his financial legs; that plaintiffs made inquiry concerning the authority of Drew to endorse the paper in the way he did, and never (so far as the record shows) pushed that inquiry to any conclusion; that inquiry was also made for whose benefit the discount was to go, and why the Sectional Dock Company wanted money. These, and other incidents of like sort, were all admissible as bearing on the question of gross negligence, and as rendering it less likely that plaintiffs were controlled by good faith in making the purchase. And the custom of the bankers of St. Louis, concerning which the plaintiffs must be presumed familiar, ought, it seems, to exercise no inconsiderable influence with the triers of the facts in endeavoring to ascer-

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tain the purchasers' *bona fides*. For although it be true, in this connection, that notice to, means knowledge of, the purchaser, (*Swift v. Tyson*, 16 Pet. 1; *Goodman v. Simonds*, 20 How. 343), yet positive and direct testimony of *mala fides* is seldom attainable. Neither courts nor juries are allowed to shut their eyes to natural and rational inferences, clearly deducible from proven facts. (*Cass Co. v. Green*, *post*; 1 Daniel on Neg. Inst., § 795). Even in criminal cases, the single fresh foot-print of the assassin, near the scene of murder, has weighed heavily in excluding all rational doubt of his guilt; and would it not be altogether monstrous to say that the testimony should be more convincing in a civil case?

But on the part of plaintiffs, it is not to be forgotten that their inquiries of Renick, from whom they made the purchase, as to whose benefit the money was to go, and why the Sectional Dock Company needed money, seemed to have received a satisfactory reply, when Renick returned with Drew's response, giving what it would appear was a sufficient answer to each of the two interrogatories, that the discount was for the benefit of the Sectional Dock Company, and that the need for the money arose because that company was carrying \$50,000 or \$60,000 of steamboat paper, which they could not let go to protest without losing the steamboat business. And evidence as to these declarations of Drew was competent, whether they were true or false; in either event they were binding on the company, whose general financial agent he was clearly proven to be—since those declarations were made *dum fervet opus*, in the course of his employment. (Sto. on Agency, §§ 139, 452, and cases cited; 1 Glf. Ev., § 113.) Drew had, for years, been acting as the general financial agent of the Sectional Dock Company, and held out to the world by that company as duly authorized to exercise the powers and perform the functions incident to such agency. His *status* was therefore as notorious as that of a cashier of a bank; as notorious as though ac-

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AGENT.



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companying all his acts there had been continuous profert made of a written power. In *North River Bank v. Aymar*, 3 Hill 262, the court says: "In speaking of the attorney's acts, I certainly mean to include his declarations made at the time, or in the business which he transacts under the power, for his declarations are part of the *res gestae*, and bind his principal equally with the act to which they relate. They are always received as evidence against the principal. I authorize a man to borrow a sum of money for me. The power being limited, he has no authority to borrow for himself, or his neighbor. He goes to the lender and borrows in my name, showing him my written power, and declaring at the same time that he takes the loan on my account. Both his acts and declarations are evidence against me. A question often arises upon this and the like cases, how far the appointee is responsible for the agent's fidelity. Take it in the instance supposed, "that his acts and professions make out a case within the terms of his authority, is the man who advances his money accountable for the truth or the good faith of a transaction which, so far as he can see and has reason to believe at the time, is in honest conformity with such authority? Take it, that the attorney comes with a falsehood, meaning the loan for his own use, or the use of another whom he desires to accommodate, must the appointee lose his money? He brings his action against the principal, and proves the letter of attorney and note as stated, is it necessary to do more? Or can the principal turn round upon him and show that his attorney was false to his interest, and so infer that the man who trusted to his letter and made a loan apparently according to its purview, must himself be visited with the consequences of the fraud? I confess that, until I heard the argument in the case, I had supposed the mere statement of such a case furnished its own answer, and that to allow such a defense would be pushing the duty of inquiry, on the part of the appointee, far beyond the principle on which it was founded; indeed, to an extent

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absolutely impracticable." "When the declarations of an agent are admitted in evidence, they are received, not for the purpose of establishing the truth of the fact stated, but as representations by which the principal is as much bound as if he had made them himself, and which are equally binding, whether the facts stated be true or false." 1 Phil. Ev., (4 Am. Ed.,) 516; *Graff v. P. & S. R. R. Co.*, 31 Penn. 489, 496.

In the *Farmers' & Mechanics' Bank v. The Butchers' & Drovers' Bank*, (16 N. Y. 125,) it was held that the *bona fide* holder for value of a check, negotiable upon its face and certified to be good by the paying teller of the bank on which it was drawn, whose authority to certify was limited to cases where the bank had funds of the drawer in hand sufficient to cover the check, can enforce the payment of the check, although the drawer has no such funds, and the check was certified by the teller without funds, and in violation of his duty, for the mere accommodation of the drawer, and upon his promise that it should never be presented for payment. In that case, Peck, the teller, was in the habit of certifying the checks of customers, with the knowledge of the officers of the bank; was furnished with a book for the express purpose of keeping a memorandum of such checks, and his authority in a proper case was indisputable, and as he was expressly inhibited from certifying in the absence of funds, it was insisted that the bank was therefore not bound. But the court, after quoting with approval the oft quoted remark from Lord Holt, in *Hern v. Nichols*, (1 Salk. 289,) that, "seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts confidence in the deceiver should be a loser than a stranger," said, "the reasoning of Lord \* \* \* Holt applies here with peculiar force. The bank selects its teller, and places him in a position of great responsibility; the trust and confidence thus reposed in him by the bank, leads others to confide in his integrity. Persons having no voice in

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his selection, are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank, and within the scope of his employment, so far as is known or can be seen, by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be held responsible? It is worthy of consideration that the fact misrepresented in this case is not only one peculiarly within the knowledge of the agent, but one with which he is made acquainted by means of the position in which he is placed by the bank, and which it is his especial province and duty to know, and which could scarcely be definitely ascertained except by application to him. These circumstances would seem to bring the case directly within the principles adopted in *Hern v. Nichols*, and in the subsequent decisions based upon that case." \* \*

"Where a party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has, or is presumed to have knowledge, with the terms of the power, he may take the representations of the agent as to any extrinsic fact, which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it." And the court then compares the case before it to one where a partner, who, though having no more abstract authority than a stranger, to execute a negotiable partnership note, for his own benefit or the accommodation of others, yet gives such a note for his own debt, and that note, although void in the hands of one acquainted with its consideration, becomes valid in the hands of a purchaser without notice, and the court then says: "The giving of a note in the partnership name, is a verbal representation that it is given in the partnership business, and if negotiable, this representation is deemed in law to have been made to every subsequent *bona fide* holder of the note." In *Griswold v. Haven*, (25 N. Y. 595,) the same principle finds enunciation, and also in *N. Y. & N. H. R. R. Co. v. Schuyler et al.*, (34 N. Y. 30,) where

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a most elaborate discussion of the question occurred, and where it was asserted of the case of *North River Bank v. Aymar, supra*, that though "discrowned by reversal," it "was lifted to its feet and restored to authority by adjudication." I have here quoted thus extensively from the foregoing authorities, because regarding them as peculiarly apposite to the present instance. Here the power to endorse was the power exercised; the legitimate exercise of that power was conceded to Drew at the trial, and was abundantly established by the evidence adduced. If the plaintiffs had instituted comparison between the power exercised and the one actually authorized, no discrepancy could have been discovered, and they had the right to rely upon the representations of the agent as to the truth of those extrinsic matters which lay within his own peculiar knowledge, unless they were apprised of the true state of affairs, either by the additional endorsement which Drew made in his individual capacity, or as the result of inquiries which they may have set on foot, taken in connection with the custom of banks and the other circumstances heretofore noted. We do not incline to the opinion that the additional endorsement on the note would, of itself, as a matter of law, be sufficient to prevent a valid and *bona fide* purchase of the note from being made, nor have we been furnished with any authorities going to that extent. In the above remarks, we have sufficiently indicated our views respecting the doctrine of good faith in the purchase of negotiable paper, so far as applicable to the case before us, and now pass to the only question of prominence yet remaining to be discussed.

IV. Drew kept the books of the Sectional Dock Company at its true office at the foot of Lesperance street, some two miles from the corner of Third and Olive streets. At the latter place the firm of T. P. Morse & Co., had an office, that firm being composed of T. P. Morse, J. D. Daggett, and Charles Drew. Daggett was a member of the Sectional Dock Company; Drew

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TEST.

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did much of the business of the latter company at Third and Olive, and for years, for his own convenience, and, it must be presumed, with the tacit acquiescence of the Sectional Dock Company, had posted two signs, one on the corner of the building, and the other on the window, containing the name of that company; and the notary, Green, had in the January preceding the service of the present notice, gone to the office where these signs were, to demand payment of Drew of a note given or endorsed by him as agent of the Sectional Dock Company. Not finding him there, the notary was directed by a clerk where to find him, he being casually absent, and he was found at the place indicated and the paper taken up. Drew was removed from his position as general financial agent, on the 10th of July, 1873; Taylor was granted letters of administration with the will annexed, on the estate of Patrick Rogers, deceased, on the 10th of June, 1873, and administration granted to him on the partnership estate of the Sectional Dock Company, on the 8th of July next thereafter. Whitaker, one of plaintiffs, was present in the probate court room when counsel were arguing the question of the appointment of Taylor to take charge as administrator of the partnership effects, and afterwards saw and read the following notice, published by Taylor in the city papers, on the 10th of July, two days after his second appointment:

“ St. Louis Sectional Dock Co.

“ As administrator of the estate of Patrick Rogers, deceased, I have received letters from the St. Louis probate court upon the partnership estate of the St. Louis Sectional Dock Co., and I hereby notify all whom it may concern that no contract or obligation for said partnership is binding unless made by my authority, and I request persons having any claims against said partnership, at once to present to the undersigned, or they will be precluded from the benefits of said estate.

“ DANIEL G. TAYLOR.



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“Dated July 10th, 1873.”

The notice of protest, the sufficiency of which is here questioned, was delivered to Drew at the Third and Olive street office, by the notary, on the 22nd day of July next following Taylor's appointment as administrator of the partnership effects. After demand of payment on Morse and Drew, at the same office, and their refusal, Daggett was not served, though the notary knew he resided in the city. Green, the notary, was apprised by conversations with Garesche, between the 8th and the 22nd of July, that Taylor had been placed in charge of the affairs of the partnership, and Garesche in charge of the Dock Company's books, to overhaul them, but no direct information was by this conversation imparted to the notary as to the removal of Drew as financial agent, or of any removal of the place of business, but the notary was aware, by common rumor, that the Sectional Dock Company did transact business at their dock yard at the foot of Lesperance street. Taylor, after taking charge of the partnership affairs, removed the table and chairs which Drew had used, from the Third and Olive street office, but though aware of the signs Drew had placed there, failed to remove them, or to post any notice there indicative of a removal. Upon this state of facts, the court being asked, declared the law to be that the service of notice was bad.

We have not been without some degree of hesitation in arriving at a conclusion co-incident in this regard, with that reached by the circuit court, but after no little deliberation, have concluded to give that ruling our sanction. And these are our reasons therefor: It must indeed be admitted that Taylor was somewhat derelict in respect of the signs of the Sectional Dock Company, at the corner of Third and Olive streets, but we cannot see that his failure has worked the plaintiffs any hurt, and this, because of the knowledge of which Whitaker, one of them, was possessed. We may lay aside and leave out of view the information which the notary may have acquired, and still that

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of plaintiffs was ample. Mr. Parsons says: "A revocation of authority may be made, either expressly or by any action in relation to the subject matter, which is manifestly irreconcilable with the continuance of the authority." (1 Pars. Cont., 71.) The notification given by Taylor in the public prints, and read by Whitaker, was plainly inconsistent with the retention of any authority by Drew. And it was the evident duty of plaintiffs to have communicated the information thus obtained to their agent, the notary. Their *laches* must be regarded, therefore, as his *laches*, and the measure of due diligence which the law requires, as remaining in this instance, unfulfilled. Holding these views, although we regard error as having been committed at the trial, we must affirm the judgment, since the lack of proper service of notice is fatal to the claim of the plaintiffs. All concur.

AFFIRMED.

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BOONE'S ADMINISTRATOR V. SHACKLEFORD'S ADMINISTRATOR.

1. **On appeal from the Probate and Common Pleas Court of Greene County**, the circuit court can try a case only as an appellate court, upon errors assigned, and not *de novo*, (following *McCraw v. Hubble*, 61 Mo. 107).
2. **Effect of Delay in Raising Jurisdictional Question: STATUTE OF LIMITATIONS.** When the defendant has neglected to raise the question whether the trial court had jurisdiction, until a late stage of a prolonged litigation, in the progress of which a judgment against him has been affirmed in the Supreme Court, that court will decline, on a second appeal, to examine the question, if the result of a ruling adverse to the jurisdiction would be to enable the defendant to interpose the statute of limitations as a bar against plaintiff's demand in a new action.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

F. S. Heffernan for plaintiff.

*F. H. Warren and Bray & Cravens* for defendant.

HENRY, J.—On the 30th day of November, 1863, Elisha Headlee, then administrator of the estate of Nathan Boone, commenced a suit in the circuit court of Greene county, against Bedford Henslee and Wm. Norfleet, administrators of the estate of Gabriel Shackleford, deceased, James Boone, Benjamin H. Boone, William C. Price and John Lair, on the bond of said Shackleford and James Boone, as executors of the estate of said Nathan Boone, the other defendants being their securities on said bond. On the first of April, 1863, Shackleford died, and on the 27th of May, 1863, the Greene county probate and common pleas court revoked the letters of said Boone; and Headlee, as public administrator, was ordered to take charge of said Nathan Boone's estate. The petition alleged that Boone and Shackleford, as executors, had in their hands, belonging to said Nathan Boone's estate, eight thousand eight hundred and seventy dollars, on which they were chargeable with interest from the 18th day of August, 1860, for which plaintiff asked judgment. Norfleet and Henslee were served with process, and judgment was rendered against them as administrators of the estate of said Shackleford. From that judgment they appealed to this court, and at its January term, 1874, the judgment was affirmed. The case is reported in 54 Mo. 518. On the 4th of May, 1874, the plaintiff presented said judgment to the probate court of Greene county for allowance and classification against the estate of said Shackleford, and the administrators filed as a set-off, an account against said estate for \$5,478.79 and interest thereon, from July 25th, 1865, amounting to \$2,876.35. This account was for notes belonging to the estate of N. Boone, with which Shackleford and Boone, executors of said estate, were charged, and which Henslee and Norfleet, administrators of Shackleford, turned over to Headlee, administrator *de bonis non*, of N. Boone's es-

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tate. The probate court refused to allow the set-off, and allowed the amount of the judgment against Shackelford's estate, and classed it in the fifth class of demands. Pending the proceedings in the probate court, Henslee and Norfleet were removed from the administration, and Julian, public administrator of Greene, took charge of the estate, and Headlee died after the original judgment was affirmed by this court, and J. D. Van Bibber succeeded him as administrator of Boone's estate. From this judgment of the probate court, allowing and classifying said demand, the defendants appealed to the circuit court. In the circuit court there was a trial *de novo*, and the defendants were allowed, as a set-off against the judgment, \$1,613 of the notes embraced in the receipt of Headlee, as administrator to Henslee and Norfleet, and rendered judgment against the estate of Shackelford for \$8,598.85, and remanded it to the probate court for classification. Both parties appealed from the judgment of the circuit court. The notes for which the set-off was claimed, were delivered to Boone's administrator on the 25th of July, 1865, nearly two years after commencement of the suit, and the original judgment of the circuit court was rendered December 12th, 1870. The defendants now insist that the original judgment was void, because the circuit court had no jurisdiction of the cause; that at all events the court should have allowed, as a credit, the amount of the assets embraced in the receipt from Headlee, administrator of Boone's estate, to defendants, administrators of Shackelford's estate. The plaintiff contends that the circuit court had jurisdiction of the cause, and that the judgment rendered therein December 12th, 1870, was a valid judgment; that the circuit court erred in trying the cause *de novo* on the appeal from the probate court, and in allowing the credit of \$1,613 against the judgment.

In the case of *McCraw v. Hubble*, 61 Mo. 107, this court held that on an appeal from the probate and common pleas court of Greene county to the circuit court of said county,

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there could not be a trial *de novo*, but that the cause should be heard and determined solely as an appellate court, and upon errors assigned. As the proceedings in the probate court were not preserved by bill of exceptions, and as the record that was transmitted from the probate court to the circuit court showed nothing in regard to the set-off, but that it was pleaded and disallowed, neither the evidence nor the grounds upon which it was rejected being preserved, the circuit court could not pass upon the propriety of the action of the probate court in that regard, and, as it could not try the cause *de novo*, it of course erred in allowing \$1,613 as a set-off against, or a credit upon the judgment.

Although the judgment of the circuit court in the original suit on the bond of the executors, was affirmed on appeal to this court, defendants insist that this court should now pass upon the question of the jurisdiction of the circuit court over the subject matter of that suit, and reverse its judgment if it be found that it had not jurisdiction. No such question was raised in the circuit court while the suit on the bond was pending there. It was not urged in this court while pending here on appeal, although the facts which appeared of record would have authorized this court to pass upon the question if its attention had been directed to the subject. It was in the record, but not in the briefs of attorneys, or the assignment of errors. When the judgment was presented to the probate court for allowance, the invalidity of the judgment was not relied upon, but defendants pleaded a set-off, and tacitly admitted the judgment to be valid, and not until the trial in the circuit court on appeal from the probate court, did they ever urge this objection to the judgment. A period of twelve years elapsed from the commencement of the suit and the judgment had been affirmed in the court of last record, before the jurisdiction of the circuit court was called in question, and not denying our right to do so when the circumstances would warrant it, we feel that gross injustice would be done the plaintiff, should we consider the question and



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determine that the original judgment was null and void for want of jurisdiction in the court to render it. If that judgment was a nullity, then the statute of limitations could be interposed against plaintiff's demand. In *Chambers, admr. v. Smith's admr.*, 30 Mo. 156, the concurrence of NAPTON, J., in the judgment of the court was distinctly placed upon the ground that "to review the former adjudication, in accordance with which the parties plaintiff had necessarily to conform their action, might now be attended with a loss of their right of action by lapse of time, a result which would be occasioned altogether by the action of this court." There was manifest justice in the ground upon which the learned judge based his concurrence; and in the case we are considering, if the judgment be now reversed, not only this court, but the defendants, by their neglect to call the attention of the court to this question when the case was here before, would occasion a loss to the estate of Boone by lapse of time, which, in all probability, would not have occurred if the question now urged upon our consideration had been urged in the circuit court, where the suit was first instituted. The Supreme Court of the United States in *Roberts v. Cooper*, 20 How. 467, held that none of the questions which were before the court on the first writ of error, could be reheard or examined upon a second writ of error in the same cause, and that to allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute in the first, would lead to endless litigation. This court has not adhered to that doctrine in its strictness, but has adopted it with a qualification that it would reconsider its former adjudication where no injustice or hardship would result from reviewing, and if wrong, overruling its former decision, and the opinion of NAPTON, J., in *Chambers, admr. v. Smith's admr.*, aptly expresses the doctrine held by this court. See also *Hamilton v. Marks*, 63 Mo. 167. Entertaining these views, it is not necessary to pass upon the question of jurisdiction urged here, for it follows that the

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judgment of the circuit court, in the original suit, must now be regarded as valid. If that suit was to recover for the misappropriation of, or failure to account for, the assets embraced in the receipt, which were the subject of the set-off, the question of allowing that set-off must be considered as *res adjudicata*. If that suit were for the recovery of other property or money, and not for these notes, then, when Shackelford's administrator delivered them to Boone's administrator, no liability was incurred by that administrator or Boone's estate to the defendant on that account, because they were the property of Boone's estate, and his administrator was entitled to them.

In addition to this, we have examined the evidence preserved in the bill of exceptions taken in the circuit court, on the trial of the cause, on appeal from the probate court, and are satisfied that a jury might properly have found from the evidence, that the judgment rendered in the original suit was not on account of these assets or any portion of them, but on account of other property and money with which the estate of Shackelford was properly chargeable. In any view to be taken of the case, the judgment of the circuit court must be reversed, and the cause remanded to that court, with directions to enter a judgment affirming that of the probate court. All concur except SHERWOOD, C. J., who, having been of counsel, did not sit.

REVERSED.

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CASS COUNTY V. GREEN, *Appellant*,

**\*Railroad Bonds: FRAUDULENT ISSUANCE OF: INNOCENT PURCHASER.** Where certain railroad bonds were fraudulently issued by means of a covenous conspiracy formed between two of the justices of the county court, their deputy clerk, the prosecuting attorney

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\* The reporter is indebted to the Chief Justice for this syllabus.

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and others, and, upon a division of the bonds in St. Louis, one of the conspirators received \$55,000 in the fraudulent bonds, and effected a sale of them to Mastin & Co., bankers in Kansas City, two days thereafter, under circumstances which showed that both members of that firm, as well as defendant, had such notice of the fraud perpetrated, as should have forbidden a purchase of the bonds; *Held*, first, that although the evidence of such knowledge was not of a direct, positive character, yet, that it was sufficient, if it established the fact of knowledge by reasonable inferences deduced from facts which were proven; and to such obvious inferences courts are not permitted to close their eyes; second, that though, primarily, the presumption favors the holder of paper acquired before maturity, yet, that such a presumption dwindles into insignificance when circumstances of the nature above noted, occur; third, that the bonds having been fraudulently issued, the *onus* of showing their acquisition in good faith devolved on defendant; fourth, that Mastin & Co., as well as defendant, being chargeable with notice, the latter could not successfully invoke the doctrine which permits even a purchaser, with notice, to purchase from one without notice; and as there were many mysteries contradictions and incongruities apparent in the testimony, and defendant, whose deposition had been previously taken, conducted the trial, but failed to introduce any evidence in contradiction to, or explanation of, certain damaging statements, tending very strongly to establish his lack of good faith, that his failure to introduce such evidence, created a presumption adverse to his success; and such unfavorable presumption is very strong, when the *bona fides* of the given transaction is questioned by the form of the procedure, and the nature and organization of the court, where instituted; that, although the testimony of defendant tended to show the transfer of the bonds by him before suit brought, yet as such alleged transfer occurred the day after the notice of injunction was served on him, and with evident intent to evade the process of the court, and he had made statements about the bonds which he afterwards contradicted in his deposition; that, as the transferee of the bonds was not complaining, defendant could not be heard to vicariously complain; and the trial court having disbelieved his testimony respecting the transfer of the bonds, this court would do likewise; and held, further, that as defendant kept the bonds concealed so that their whereabouts could not be discovered, nor they be reached by ordinary process, and as defendant threatened to transfer the bonds, that, although the bonds were really invalid, yet, as they were apparently good, the remedy by law was manifestly inadequate, and equity would interfere—this being a case analogous to that where it interferes to remove a cloud upon a title to land.

*Appeal from Jackson Special Law and Equity Court.*—HON.  
R. E. COWAN, Judge.

This is an injunction to compel the cancellation of certain bonds of Cass county. The petition sets out that the bonds were issued in pursuance of an order of the county court of said county, which directed their issue for the purpose of funding the debt of the county on account of a subscription to the capital stock of the Missouri Pacific Railroad; that they were negotiable in form and transferable by delivery; that they purported on their face to be issued under the authority of the act of the General Assembly approved March 24th, 1868, entitled "An act to enable counties, cities and incorporated towns to fund their respective debts;" that none of them were due, being by their terms payable at periods of between fifteen and twenty years from the 22nd of February, 1872; that in truth and in fact, at the time of making the order, there was not any debt whatever of the county on account of a subscription to the capital stock of said company, but the bonds were issued without any consideration, fraudulently and illegally, by two of the justices of the court in execution of a conspiracy formed between the said justices and certain other persons, among whom was one Cline; that the fifty-five bonds in controversy were Cline's share of the plunder, and were sold by him to Mastin & Co., who were cognizant of the conspiracy and fraud, and were by them sold to defendant, who, likewise, had notice of the facts; that plaintiff had repeatedly demanded them of defendant, who refused to deliver them up, and refused to obey the orders of the courts made in divers actions at law brought against him to compel him to deliver them up, and had concealed them so that they could not be seized by process of law; that in the meantime he was annoying and harrassing the county by suits brought and prosecuted in the name of fictitious persons, and pretended holders, for the

recovery of interest on them; that he, often falsely pretended that he had already transferred them; and that unless restrained from so doing, he would transfer them so as to render any decree in this case ineffectual.

The answer denies all the allegations of the petition charging fraud, conspiracy and illegality, and avers that long prior to the issue of the bonds the county had made a conditional subscription to a branch of the Tebo & Neosho Railroad, by which the county agreed to transfer to that company a subscription previously made to the Pacific Railroad, together with all interest accrued, if the bonds issued to the latter company were surrendered; that on the faith of said subscription, said road was built, and said bonds surrendered, and the bonds in controversy were issued to pay said subscription under the act of 1868, authorizing counties, cities and incorporated towns to fund their respective debts; and that the charges of fraud made in the petition were falsely and fraudulently made by the county to avoid its just liabilities, and, after obtaining a railroad on the faith of its promises, to defraud the company that built it, by false pretenses, murder and mob violence.

A reply was filed denying the new matter set up in the answer, and denying that the bonds were issued under the authority of the act of 1868, or of any law whatever.

A trial was had, and the court found that the bonds were fraudulently issued; that defendant purchased them under circumstances that ought to have excited his suspicions as a prudent and careful man, and caused him to make inquiry in regard to the making, executing and issuing of said bonds; that having failed to make such inquiry, he is chargeable with notice of all the facts he might have ascertained by proper inquiry; that at the time of the commencement of this suit the defendant had the possession, control and management of said bonds, and that they were negotiable; and decreed that the bonds be brought into court and delivered up by defendant and be cancelled.



*Cravens & Green* for appellant.

1. The pleadings show upon their face that the plaintiff has a full and complete remedy at law, and that there is no equity in the case, in this, the reply to defendant's answer, denies that the bonds were issued under the act of the General Assembly of the State of Missouri, approved March 24th, 1868, or any other law, or that the county court had power or authority to issue said bonds, or that they are regular or valid on their face. If there was no power to issue the bonds, then they are void in the hands of any purchaser, and the plaintiff would have a complete defense to any suit upon them at law, and a court of equity has no jurisdiction, and the court should have sustained the objections of the defendant to the introduction of any evidence, and have dismissed the suit for want of equitable jurisdiction. A municipal corporation, obligors in a bond, cannot ask relief in equity that the obligee be enjoined from proceeding at law, and that the bond be surrendered, when its bill alleges that the bond was issued without authority and in violation of law and in fraud of the town, and that the obligee knew this when he took it. The rule is to dismiss plaintiff's bill if it appears to be grounded on a title merely legal and cognizable at law, notwithstanding the defendant has answered the bill. *Grand Chute v. Winegar*, 15 Wall. 355.

2. It is necessary for the court to find that the banking house of Mastin & Co. purchased with notice of the alleged frauds, for if they were innocent purchasers for value, any purchaser from them, before maturity, would take them purged from the alleged frauds. This issue, which is the second made by the pleadings, and necessary to the determination of the case, is entirely ignored by the court in the decree, and it is not, in this respect, responsive to the issues. For this reason the decree should be reversed, and a decree rendered dismissing the plaintiff's suit with costs and damages.

3. Counsel argued at length that the evidence showed both Mastin & Co. and the defendant to be innocent purchasers.

*James O. Broadhead*, and *Gage & Ladd* for respondent.

1. The plaintiff is entitled to the relief granted, if the bonds were fraudulently issued and the defendant is not a *bona fide* holder thereof, for value, without notice of their invalidity. The bonds are valid on their face and are negotiable. Story's Eq. Jur., §§ 699, 710. The holder of negotiable securities, endorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them; because, if negotiated, the maker or endorser must pay them. *Osborne v. U. S. Bank*, 9 Wheat. 738, 848; *Hilliard on Injunctions*, Ch. 30; 1 Mad. 154-5; *Hamilton v. Cummings*, 1 Johns. Ch. 516; *Reed v. Bank*, 1 Paige Ch. 218; *High on Injunctions*, § 712; *Hood v. Aston*, 1 Russ. 412.

2. The failure of the defendant to deny or explain the material testimony of witnesses regarding his own acts and conversations, when it was in his power to do so, had such statements been false, or susceptible of explanation, is a confession on his part of their truth, and their obvious effect is to impeach the transaction. *Adams v. Adams*, 21 Wall. 185; *Comm. v. Webster*, 5 Cush. 295; *People v. Wharton*, 4 Barb. 438.

SHERWOOD, C. J.—Two questions of prominence present themselves: First, whether the evidence adduced suffices to support the allegations of the petition and warrant the decree rendered. Second, whether on the case made by the pleadings, the plaintiff has any standing in a court of equity. Defendant, seeking a reversal, holds in each instance the negative. As the pleadings are lengthy and the evidence voluminous, and as the substance of each is hereto prefixed, we will not discuss the evidence in de-

tail, nor give more than an outline of the petition which seeks the surrender and cancellation of 55 funding bonds of Cass county, for \$1,000 each, (dated February 22nd, but issued March 1st, 1872,) and an order restraining defendant from their negotiation. This relief is asked on the ground that the bonds were fraudulently issued, and that Mastin & Co., as well as defendant, are purchasers with notice.

I. Relative to the first point: A careful perusal of the evidence has fully satisfied us that a conspiracy was formed by the parties named in the petition to secure the issuance of the bonds of Cass county and their transfer to and distribution among the conspirators; that this conspiracy was successful and the conspirators smitten with sudden fear at their own iniquitous success seized their ill-gotten gains and, justly apprehensive of popular indignation commensurate with the fraud perpetrated, sought safety in flight and opportunities in the distance for the secret and secure division of their plunder. This division occurred March 2nd, 1872, in St. Louis, and was marked as was the entire affair from inception to termination with the secrecy, hurry and trepidation usually incident to *larcenous* operations. A large portion of the bonds taken across the river to East St. Louis, and there placed in the custody of an express company for safe keeping, were afterwards recovered by the county in an action of replevin. Cline, the county attorney of Cass county, received, as his share of the spoil, \$55,000 in bonds, and left on the same day. So conspicuously conclusive is the evidence regarding the fraudulent issuance of the bonds, that defendant does not seriously controvert it, but relies on the defense of being an innocent purchaser. (It is worthy of parenthetical remark in this connection, as one of the anomalies incident to the transfer of railroad bonds, that a purchaser of a different description is seldom, or never seen.) Let us examine the facts and weigh the evidence, in the endeavor to ascertain whether the claim which defendant

makes does indeed rest upon a substantial foundation. And, as defendant claims also that John J. Mastin & Co. occupy the like high-toned attitude in this regard as himself, and as their fates and fortunes seem to be indissolubly blended, we will consider their respective claims in connection with each other. After leaving St. Louis, Cline is next seen in Kansas City, on the morning of the 4th of March, 1872, engaged in the effort to sell his share of the bonds. He approaches Thos. H. Mastin, of the firm of John J. Mastin & Co., bankers, and endeavors to effect a sale to him. Mastin states that no bonds were exhibited to him; that he declined to purchase, when Cline pressed the matter on him, stating that they were a good investment, being funding bonds; that there was nothing about them to which objection could be made except that they were signed by the deputy instead of by the clerk; but that had been provided for in the order of the court; that Cline, being asked why the bonds were not signed by the clerk himself, replied that the latter was absent on a committee which had been sent to Clinton to look after the interest of the county in the Memphis railroad; that witness asked Cline as to an injunction and mandamus that had been sued out, and was told by Cline that the mandamus suit had been dismissed and the injunction fell with it; that witness again declined to purchase, and on passing out of the door to go to Independence, saw his brother and partner, John J. Mastin, talking to their attorney, Black, and to Cline in reference to the matter; that witness gathered from the conversation that Cline had made the same statements to witness' brother as previously made, regarding the validity of the bonds, but that Black being interrogated by the brother of witness did not concur in Cline's opinion; that thereupon witness proceeded to Independence, returning about 3 o'clock the same day. During his absence the bonds were purchased for the firm by Jno. J. Mastin, at 60 cents. While in Independence Thos. H. Mastin related in Chrisman's office, with evident zest, the

trick whereby the clerk (of the Cass county court), opposed to funding the Pacific bonds, had been sent away on a committee to Clinton, and the bonds were signed by the deputy in his absence.

Now, it would seem very far from probable, and probability is the chief guide in placing a proper estimate upon evidence, that Thos. H. Mastin would see his brother and partner asked to purchase a large amount of bonds, which he, himself, had just refused to purchase, and yet pass him by without so much as a single word or gesture of warning or disapproval. And then take the conduct of Thos. H. Mastin in Chrisman's office. Did he rejoice at the subterfuge by which an honest clerk was spirited away and a dishonest deputy substituted in his stead, and the people of Cass county saddled with a large fraudulent debt, because he *loved fraud for fraud's sake?* or was it because he expected the fraud to be personally beneficial, to swell his revenues and enrich his coffers? The latter supposition is more creditable to him and more credible to us. But how, when and where, did Thos. H. Mastin derive the information that the clerk was opposed to issuing the bonds? And how, when and where that the county court of Cass county "got the advantage of the clerk?" Nothing that Mastin reveals as having transpired in the conversation with Cline afforded that information. Either, then, Cline in the conversation with Thos. H. Mastin, must have revealed more than the latter testified to, or else prior to the 4th of March Thos. H. Mastin must have been apprised of the conspiracy to get the clerk out of the way; a matter virtually predicted by Cline nearly a month before, when procuring and purchasing the services of the deputy Yelton; and Cline, about a week before his last visit to Kansas City, had been there and conversed with Thos. H. Mastin.

When we take all these matters into consideration, the conclusion is very strong that Mastin, who it does not appear had any business at Independence, went there in



order to be conveniently absent, being well aware that he at least knew too much to be an innocent purchaser. If he had notice, then that was notice to the firm of which he was a member. But there are other grounds for the belief that John J. Mastin was also aware of those things which should have precluded a purchase by him. He, when approached by Cline and asked to purchase the bonds, declined to "trade" until his attorney said they were all right.

He then took the bond and order to Black's office. What occurred there is not known, but it is certain, according to the testimony of Thos. H. Mastin, that Black, on coming down to the bank, did give an opinion in opposition to that given by Cline as to the validity of the bonds; and John J. Mastin says himself that Cline did not succeed in impressing Black favorably with the order.

Yet, notwithstanding this adverse opinion, leaving behind him the objectionable order which authorized the issuance of the bonds, he took the bond alone and consulted defendant about the validity of the issue. Green was not counsel for Mastin, and it is noteworthy, in this connection, that Mastin did not go to Green's law office, but to the *Times* office, where he "expected to see him." Green, the testimony shows, was the frequent purchaser of and dealer in railroad bonds, but he never inquired for the funding order, nor did Mastin offer it to Green, although the evidence shows that it is customary, when offering bonds for sale, to accompany them by the order which authorizes their issue.

In short, Mastin, who would not purchase till his attorney said so, concluded to buy, whether he said so or not; was more willing, in other words, to trust Green's judgment, without a funding order, than Black's with one. And Green was so highly pleased with the looks of the bond that after a brief examination of the law of 1868, without more ado, gave an enthusiastic opinion in favor of their validity. But Green did have a copy of the funding

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order. Mr. Allen's uncontradicted testimony shows this. There were but three certified copies of the funding order made out by Yelton, which were delivered to Cline. Where did Green procure his copy? Not from Mastin if the latter is to be credited. Who else then but from Cline? Mr. Allen states also that Green, when offering the bonds to him for sale, represented himself as merely interested in selling on commission for an acquaintance; that Green's attention was drawn to the fact that the specimen bond exhibited "bore a different number from any authorized in the other paper;" that the bond "was signed by a deputy, and was either dated or interest made payable on a legal holiday." Mr. Allen expressed doubts on all these points. He also states that Green left the bond with him, with the understanding of returning at a later hour; that on his return, Green stated that since the first interview, he had met some one from Cass county. Mr. Allen thinks Green said a "county officer" of that county, who had personal knowledge of some of the matters raised in the first conversation, and knew them to be all right. The only county officer in town that day, so far as the record discloses, was Cline; but Green is particular to state in his deposition taken before trial, that it was not till after his purchase of the bonds from Mastin & Co. that he saw Cline, and then only to speak, shake hands and pass on. Green in his deposition is altogether silent about a funding order, and professes not even to know that the bonds "were issued for a railroad subscription." Yet, if Allen's testimony is true, and it is nowhere contradicted, such ignorance was wholly impossible. The precise time that the sale was consummated between Green and Mastin, and between the latter and Cline, is not disclosed. It is known, however, that Green's check for \$10,000 was given before Cline was paid. Green, who is evidently possessed of more than ordinary shrewdness and intelligence, had two interviews with Allen and at least three with Mastin before completing the purchase. It seems difficult of belief that Green would have

ventured to offer the bonds to Allen for 75 cents, and even to make a reduction on that figure of from one to one and one-half cents; "to deduct part of his commission," and to give assurances that "the other party would make some reduction," unless he both knew that he had authority so to do, and that the figure at which he offered to sell would afford a profitable margin to his "acquaintance" or principal. But Jno. J. Mastin is careful to say that he never told Green what he paid for the bonds. These statements of Green to Allen, and of Mastin, when a witness, cannot be readily reconciled. If Mr. Allen gives a correct version of the affair, it very strongly indicates that Green had seen Cline, the only "county officer" then in town, before making his purchase. If he did see him, it is scarcely credible, if really desirous of becoming what he now so zealously professes to be, an "innocent purchaser," that he failed to make full inquiry touching the matters he and Allen had just before talked of. Allen's testimony, too, points very decidedly towards a secret understanding or complicity between Green and Mastin respecting the purchase of the bonds, and it is not at all easy, on perusing the evidence, to divest the mind of such unfavorable impression. Nor does it tend to diminish that impression, when we see the wondrous anxiety, after the fraud became public, that Green displayed to stop payment of the drafts and acceptances given to Cline by Mastin & Co., and to search, with similar purpose, the dead body of the suicide Higgins (the only one of the bond brokers who gave token of a conscience). If Green was indeed an innocent purchaser, what interest could he feel, what need he care, whether those certificates and acceptances were paid or protested? Green says his purpose was to protect himself and the county. No doubt such solicitude in behalf of the county was, though tardy, highly commendable. But what protection did an "innocent purchaser" need? The only rational hypothesis with which this anxiety of Green's

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can be reconciled, is his collusion with Mastin & Co. in the purchase of the bonds.

Besides all that, even if we concede that the \$10,000 was really paid by Green, and paid in good faith, what excuse has he to offer for paying his note for \$29,600, long after discovery of the fraud? His defense in any action by Mastin & Co. on the note would, it seems, have been ample. He certainly, therefore, can lay no claim to having paid that sum, at least, in good faith. And Thos. H. Mastin's testimony shows that Green was fully aware that if the bonds were "fraudulent or forged, he would have recourse" against them. John J. Mastin says the note of Green was paid "in money or its equivalent." What equivalent? Their cash-book shows no such payment. John J. Mastin states that Cline's administrator threatened, unless they paid the acceptances given to Cline, to throw the firm into bankruptcy, and thereupon they paid them. And on the same day Green is called upon and pays his note, as it is said, thus keeping up the coincidence of payments which began when Green drew his check, the only difference being that payment of the check took place just *before* Cline was paid, and the payment of the note just *after* his administrator was paid. But what caused Mastin & Co. to so readily yield to the demand of Cline's administrator? Their defense, too, would appear to have been good. These are mysteries which deserved and should have received the fullest explanation. The above, however, are not the only mysteries, incongruities and contradictions presented by this record.

When the endeavor was made by the Cass county officials in the latter part of March, 1872, to discover the *locus in quo* of the bonds in order to replevy them, Thomas H. Mastin stated that they were not interested, that they had only purchased as the "agents or brokers" of Green; and yet, when on the same day, and a brief space thereafter, Green, in the presence of Thomas H. Mastin, states em-

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phatically that he bought the bonds of John J. Mastin & Co.; had nothing to do with Cline in the transaction, Mastin stands mute, interposing no denial. When the latter is asked where the bonds were, he said Green had taken them from his safe the evening before. Green, replying to the same question, says that he had "sent" or "shipped" the bonds East some six days before, and they were beyond his reach. But the deposition of Green shows that up to the 10th of October, 1873, when the writ of replevin and notice of injunction were served on him, the bonds were in his possession, or under his control, and had never left Kansas City. When we reflect on the foregoing diverse statements, and numerous others of like kidney scattered through this record, these questions come unbidden before us. *Need honesty shelter itself behind prevarication? Must good faith summon to its aid the motley troop of falsehood?* No one so bold as to answer yea. We have hitherto examined the facts of this case, as if the *onus probandi* were on the county.

But the evidence having established the fraudulent issuance of the bonds, that burden is cast in all its weight on the shoulders of the defendant. This ruling is in full accord with our most recent adjudication. *Hamilton v. Marks*, (63 Mo. 167.) In that case our approval was bestowed upon the views of the latest elementary writer on this subject: "That if the maker \* \* \* \* proves that there was fraud or illegality in the inception of the instrument; or if the circumstances raise a strong suspicion of fraud or illegality, the owner must respond by showing that he acquired it *bona fide*, for value in the usual course of business while current, and under circumstances which create no suspicion, that he knew the facts which impeach its validity." (Daniel Neg. Instr. Sec. 815.) Primarily, as a matter of course, the presumption favors the holder of negotiable paper acquired before maturity. (*Horton v. Bayne*, 52 Mo. 531.) But this presumption must be for naught held and esteemed, when a record, such as



this, stares us in the face; and we are fully persuaded that in order to hold either Green or Mastin & Co., innocent purchasers, we must shut our eyes to most obvious inferences deducible from proven facts, and close our ears to arguments based thereon of most persuasive cogency.

Our object in considering the claim of Mastin & Co., to be considered innocent purchasers, in connection with a like claim made by Green, is because of the assertion made by the latter, that if the former purchased without notice, defendant, even if a purchaser with notice, would take a title purged from all fraud. There is no doubt of the general correctness of this assertion, (2 Glf. Ev. § 171,) but inasmuch as we regard both Mastin & Co. and defendant as purchasers with notice, this doctrine has here no application.

But we must not conclude our remarks touching the sufficiency of the evidence before adverting to some other matters. The defendant was present at and conducted the trial. The opportunity for giving explanation of, or contradiction to, the damaging statements made by Allen and others, which tended to show defendant's want of good faith, was thus open to him, and yet he failed to embrace it. The presumption, under such circumstances, is always adverse to the party thus making default. (*Adams v. Adams*, 21 Wal. 185; *Henderson v. Henderson*, 55 Mo. 559.) And this failure is rendered more strikingly apparent when it is remembered that the good faith of defendant, is, by the very form of this procedure, directly called in question; questioned in a court of equity, which cannot look upon unfair dealing with the least degree of allowance; questioned in a court accustomed from its very nature and organization to track fraud through all its crooked pathways, and to drag it forth discomfited from its most hidden recesses.

Again, it is insisted that the judgment must be reversed because the evidence shows that the bonds were transferred before suit brought. That transfer, it is said, oc-

curred on the 11th day of October; but the injunction notice was served on the 10th, and the injunction granted on the 18th of that month. The party to whom the bonds are alleged to have been transferred, is not here complaining, and the defendant cannot be heard to vicariously complain. Besides, the court below may perhaps have concluded (and we are not prepared to dispute the correctness of the conclusion) that defendant's assertion respecting the transfer of the bonds rested on no more secure foundation than his claim to being an innocent purchaser.

II. In regard to our second point: The case of *Grand Chute v. Winegar*, (15 Wallace 355, 373,) is cited as showing that plaintiff is entitled to no relief in equity. But that case is totally unlike this. There an injunction was prayed of a suit at law on some bonds, on the ground that the bonds were void. It does not appear whether the bonds were not mature at the time of their reception, nor that the holder threatened to negotiate them, and the bill was very properly dismissed because the remedy at law was amply adequate. Here, on the contrary, though the reply shows that the bonds are void, yet the petition charges, in addition to the matters already noticed, that repeated demands and actions at law had proved unavailing to recover possession of the bonds from defendant; that defendant refused to obey the order of the court and deliver possession of the bonds, but kept them concealed so that they could not be reached by process at law; that the bonds were negotiable in form and transferable by delivery; that defendant pretended he had already transferred them, and unless restrained defendant would transfer them, so that any decree rendered would be ineffectual. It is quite clear that any remedy at law would, in this case, be wholly inadequate and, therefore, equity has jurisdiction. This proceeding is somewhat analogous to that where a party is seeking to remove a cloud upon his title; the title held by his adversary, though void, is on its face valid, and may be made the basis for repeated actions at law.

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(*Harrington v. Utterback*, 57 Mo. 519.) So in case of these bonds, which though void, are yet apparently good, the equity of the plaintiff is equally clear to the relief sought, and we affirm the judgment. All concur except Hough, J., not sitting.

AFFIRMED.

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DIX V. MORRIS, *Appellant*.

1. **Executor's Final Settlement Conclusive on his Sureties.** An order of the probate court made upon a final settlement, ascertaining a balance to be due from an executor and directing him to pay it over, is conclusive against his sureties in an action on his bond, (*following, State v. Holt*, 27 Mo. 340; *State v. Rucker*, 59 Mo. 17.)
2. **Liability of Executor Administering on Real Estate.** Although the general principle is that the realty descends to the heir, and the executor has nothing to do with it, except in case of deficiency of assets; yet, when, as matter of fact, he assumes control of it and collects the rents, or when the will gives him authority to sell, and he exercises the authority, he is liable on his bond as executor, if he fails to account for the rents or for the proceeds of sales.

*Appeal from St. Louis Court of Appeals.*

The case is reported in 1 Mo. App. 93.

*P. E. Bland* for appellant.

*Herman A. Haeussler* and *A. W. Slayback* for respondents.

NORTON, J.—This was an action by *scire facias* issued from the probate court against the appellant, as surety on the executor's bond in the matter of the estate of Henry A. Dix, deceased. The decedent left a will directing the payment of his debts, and giving "the remainder" of his "estate, real, personal and mixed," to his widow during

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her widowhood, "for her to use and enjoy for her sustenance and support, and for the sustenance, support and education" of his children, naming them, and providing that should his widow marry, then his "estate, real, personal and mixed, which shall then remain unconsumed and unexpended," should be equally divided among his children, reserving to his widow all her rights under the law, as if the will had not been made. The will also authorized the executor "to sell and convey by deed or otherwise, all or any portion of my said estate, real, personal or mixed, on such terms or conditions as he shall think proper, in order to carry out the provisions of this will." It further appoints the widow guardian of the children, and Joel G. Harper, executor. The executor duly qualified, giving bond with the appellant as his surety. On the final settlement of the executor's accounts, the probate court found and adjudged a balance against him of \$5,813.57, and made an order directing him to pay the same to the respondent. Harper failed to perform this order, execution was issued against him thereon, and a return of *nulla bona* was made on such execution by the marshal of the county, and thereupon the said *scire facias* was issued against the appellant, who failing to appear, judgment by default was taken against him in the sum of \$5,978.24, from which judgment he duly appealed to the circuit court, where the cause was tried *de novo*, and which gave judgment against the appellant for \$6,220.57. On appeal to the general term, and thence to the St. Louis Court of Appeals, the said judgment was affirmed, and the cause is here by appeal from the latter court.

On the trial below, it was admitted that the debts of the estate amounted to the sum of \$161, and that the personal assets converted into money by the executor amounted to the sum of \$8,100. The breach of the bond alleged was the failure of the executor to perform the said order of the probate court, directing him to pay the said balance found against him on said final settlement. Harper, the

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executor, disbursed the said \$8,100, paying the said debts prior to his annual settlement in 1868, at which settlement there was a balance found in his favor of \$350. There was never any order of the probate court directing the executor to take charge of or to rent the real estate, nor any order for the sale of the same, or any part thereof, and without any such orders the said executor collected the rents of the realty, and brought the same into his administration by charging himself therewith in his accounts and settlements with said court, and sold a portion of the realty and brought the proceeds of sale into administration, charging himself therewith in said accounts and settlements. These rents and proceeds of the sale of land wholly constitute and compose the balance found by the probate court against the executor on his final settlement—and which the said court ordered to be paid over as aforesaid. All of these facts the appellant offered on the trial, to show by the annual and final settlements, and by the records of the probate court; but the court overruled said offer and excluded said evidence, on the objection made by the respondent, who admitted the facts to be as offered to be proven, but claimed that the facts themselves were irrelevant and incompetent, and the appellant duly excepted to such ruling of the court.

It is urged as a reason for the reversal of the judgment, that the court erred in refusing to allow the annual settlements of Harper, the executor, to be read in evidence. This is the only point presented for our consideration. The evidence rejected by the court was offered for the purpose of establishing the fact that the balance of \$5,183.57 found to be in the hands of the executor on his final settlement, and ordered to be paid over to plaintiff, as the widow of the testator, was entirely made up of rents received and the proceeds of the sale of real estate made by the executor under the will. It appears from the record that Harper, the executor, entered upon his duties as such in 1867, and made his regular annual settlements till 1873,



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when, after proper notice given, he made his final settlement, which resulted in finding him indebted to the estate in the sum of \$5,183.57, which he was adjudged or ordered to pay over to plaintiff. No appeal was taken either from the final settlement as made, or the order of the probate court. The judgment or order of the court directing the executor, Harper, to pay over to plaintiff the sum ascertained to be in his hands on the final settlement as assets belonging to the estate, was conclusive upon him and his securities, and could not be assailed in the method proposed by defendant. In the case of *State v. Holt*, 27 Mo. 340, which was a suit against an administrator and his securities for breach of the bond in refusing to pay over by the administrator, on an order of distribution made by the county court of Marion county, a certain sum of money as assets of the estate, the question was whether the securities were bound by the judgment, or were at liberty to show that the administrator had no assets in his hands, notwithstanding the judgment. Judge NAPTON in disposing of this question observes: "The plaintiffs here show an order or judgment of the county court for a specific sum of money, which the court finds and adjudges to be assets of the estate, in the hands of the administrator, and which they order to be paid over to the plaintiffs. \* \* The defendants admit the judgment, and that the administrator has not paid the money, but they propose to show that this judgment or order of the county court was wrong; that in fact and in truth the administrator had no assets in his hands. In other words, they propose to try over the very questions of law and fact determined in the county court, upon the ground that they were not parties to the proceeding, and without any allegation of fraud or collusion in obtaining the judgment. Our conclusion is that sound public policy and the practical attainment of justice will be best subserved by letting the judgments of the county or probate courts be conclusive on the securities, except in cases where fraud or collusion is shown." To

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the same effect is the case of *State ex rel. v. Rucker et al.*, 59 Mo. 17.

The evidence offered was, also properly rejected, for the reason—that if it had been received and had proved what was sought to be established by it—viz: that the balance in the hands of the executor was made up altogether of rents and the proceeds of the sale of the land, it would not have relieved defendant from liability. In the case of *Gamble et al. v. Gibson, Exr.*, 59 Mo. 585, it was held, that although the general principle is that the realty descends to the heirs, and the executor has nothing to do with it, except in case of deficiency of assets, yet, when as a matter of fact, he does retain charge of it and collects the rents, he is responsible for them as executor. It was also held in the case of *State v. Scholl*, 47 Mo. 84, that although an administrator sells leasehold and other property without an order of court, the administrator and sureties are liable on the bond. It may further be said, that one of the conditions of the executor's bond was "that he should well and faithfully execute the last will and testament, &c." It was expressly provided in the will that the executor should have the authority to sell all or any portion of testator's estate, real or personal, on such terms as to him should seem good, in order to carry out its provisions. This unquestionably gave him full power to assume control of both the realty and personalty, and sell the same independent of any order of the probate court. We deem it unnecessary to review the authorities in other States to which we have been cited by counsel, and which it is claimed establish a different doctrine from that adopted by our own court, especially when we believe it to be in accord with sound reasoning, and promotive of the interests of all parties concerned in the just and honest management of the property of decedents, whether dying with or without a will.

The judgment before us, endorsed as it is by the probate court, circuit court, general term and St. Louis Court

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of Appeals, and being in harmony with the rulings of this court heretofore made, will be affirmed with four per cent. damages, in which the other judges concur.

AFFIRMED.

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CASSIDY, *Appellant* v. METCALF *et al.*

**Power of a Court of Equity to reform Contracts.** A court of equity will order a contract to be reformed so as to make it speak the actual agreement of the parties, when satisfied, that by mistake, in reducing it to writing, property has been transferred which it was not the intention of either should be included in the contract—and this in a case where the complainant himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of words, or through sheer carelessness. But where it appears that the complainant has been guilty of such breaches of the real contract as substantially to deprive the other party of all its benefits, the reformation will be ordered only on condition that the parties be put, as nearly as may be, in *statu quo*; as by the return of all moneys received by the complainant under the contract.

*Appeal from St. Louis Court of Appeals.*

The case is reported in 1 Mo. App. 593.

*Hitchcock, Lubke & Player* and *Ellis & Sullivan* for appellant.

1. When by mistake, the written agreement contains less than the parties intended, or contains more; or where it simply varies from their intent, by expressing something different in substance from the truth of the intent—in all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties. 1 Story Eq. Jur., § 152. It is the province of a court to enforce the contracts and conveyances of the parties, and

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not to make or alter them; but it is the duty of the court to enforce the contract which was really made, and when by mistake that contract is not expressed in such terms as to have the force and effect that the parties intended it should have, then it is the clear duty of the court to correct the mistake in the instrument. \* \* \* \*

It is not necessary, in order to establish a mistake in an instrument, that it shall be shown that particular words were agreed upon by the parties as words to be inserted in the instrument. It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention. The power of a court of equity to reform an instrument which by reason of a mistake fails to execute the intention of the parties is unquestionable. *Leitensdorfer v. Delphy*, 15 Mo. 166. Mistakes may consist either in the circumstance that the instrument by which the parties intended to express their intent does not so express it, or does not express it accurately, or in the circumstance that the intention of the parties, though correctly expressed, has nevertheless been reached through some misapprehension or ignorance. In the one case the intention is erroneously expressed; in the other, the intention is founded in error. The relief pertinent to the first case is correction; to the second, rescission. *Bispham's Eq. Prin.*, § 190. A court of equity has jurisdiction to reform a written contract upon parol evidence where the agreement made by both parties has not been correctly incorporated into the instrument through accident or mistake in framing it. *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 36; *Hunt v. Rousmaniere*, 1 Peters 13; *Bradford v. Union Bank*, 13 Howard 68; *Botsford v. McLean*, 45 Barb. 478; *Lyman v. United Ins. Co.*, 17 Johns. 372; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144; *Coles v. Bowne*, 10 Paige Ch. 534.

2. As to the evidence required for a decree of reformation on the ground of mistake: Relief will be granted

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in cases of written instruments, only where there is a plain mistake clearly made out by satisfactory proofs. 1 Story Eq. Jur., § 138 *e* note *a* and cases cited.

3. The prevention of a fraudulent or unconscionable advantage, whether claimed on the ground of contract, or even of a statute, is always sufficient ground for equitable relief. 1 Story Eq. Jur., §§ 759, 138*e*; 2 Ib. § 1522*a*; *Farrar v. Patton*, 20 Mo. 84; *Dickerson v. Chrisman*, 28 Mo. 140; *Townsend v. Hawkins*, 45 Mo. 286; 2 Washburn Real Prop. (3rd Ed.) p. 487; *Strong v. Stewart*, 4 John. Ch. 167; 2 Story Eq. Jur., § 1522*a*; *Wilson v. Drumrite*, 21 Mo. 329.

4. Counsel made an argument upon the facts to show that there was no want of equity in the plaintiff, insisting that he had not bound himself not to go into the same business again in St. Louis, and that the dissolution of the firm into which defendants bought, was not the result of any act of his.

*Thomas A. Russell* for respondents.

In his petition, plaintiff, after setting forth the words of the contract, avers "that he, the said plaintiff, in good faith supposed that the said words, so used in said instrument, conveyed and expressed correctly the nature of the said agreement, which he had in fact made." This shows that the language used in the written agreement was deliberately used, and the plaintiff, who drew up the instrument, did not intend the use of other words, believing that those used correctly expressed the intention of the parties to the agreement. The written agreement was exactly what both parties intended it to be, neither more nor less.

All the testimony goes to show that plaintiff used the words without any suggestion from defendant Moore, whatever. Supposing, for the sake of argument, that plaintiff did not correctly express his intention, was the mistake one of law or of fact, and is it to be treated as a mistake at all? A mistake of law arises when a person under an



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erroneous conviction of law does or omits to do some act which, but for the erroneous conviction, he would not have done or omitted. We think that the mistake would be one of law.

The use of words that have been construed by the courts, and to which has been attached certain definite legal significance, should bind the parties. The word "interest" has had a certain definite meaning, a fixed legal significance for a century, and yet a person using it without understanding its legal effect, is said to have committed a mistake of fact. This will not hold good; it is a fact, according to his allegations, only that he did not understand the legal effect of the words he used, and was ignorant of the construction courts had given them, but the use of the word was no mistake of fact.

His mistake was one of law against which a court of equity will not relieve. *Smith v. Powell*, 14 Law Rep. 90; *Penny v. Martin*, 4 Johns. Ch. 567; *Durant v. Bacot*, 2 Beaseley 201; *Burt v. Powell*, 28 Cal. 632; *Hoover v. Reilly*, 2 Abb. (U. S.) 471; *Nelson v. Davis*, 40 Ind. 366; *Heavenridge v. Mondy*, 49 Ind. 434; *Wood v. Price*, 46 Ill. 439; *Goltra v. Sanasack*, 53 Ill. 456; *Gordere v. Downing*, 18 Ill. 492; *Brantley v. West*, 27 Ala. 542; *Sims v. Lyle*, 4 Wash. C. C. 320; *Wintermute v. Snyder*, 2 Green Ch. 490; *Broadwell v. Broadwell*, 1 Gilman, (6 Ill.) 600; *Hall v. Reed*, 2 Barb. Ch. 500; *Adams Eq.*, Marg. pp. 189, 191; 1 Story Eq. Jur., §§ 120 and 151; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Champlin v. Laytin*, 18 Wend. 407; *Viner Abr. Tit. Ch. N. Com. Dig.* 3 F. 8; *Hunt v. Rousmaniere*, 1 Pet. 1; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Storrs v. Barker*, 6 Id. 166; *Arthur v. Arthur*, 10 Barb. 9; *Gilbert v. Gilbert*, 9 Barb. 532; *Bispham Eq. Prin.*, § 187; *Kerr on Fraud and Mistake* 409, 414; *McElderry v. Shipley*, 2 Md. 25; *Leavitt v. Palmer*, 3 N. Y. 19; *Stoddard v. Hart*, 23 N. Y. 556; *Garner v. Bird*, 57 Barb. 277; *Thompson Scale Man. Co. v. Osgood*, 26 Conn. 16; *Morris v. Labarra* 58 Me. 26 *Harney v. Charles*, 45 Mo. 157.

2. Counsel examined and distinguished the following cases on the same general subject; *Wyche v. Green*, 11 Ga. 159; *Smith v. Jordan*, 13 Minn. 271; *McAninch v. Laughlin*, 13 Pa. 371; *Wemple v. Stewart*, 22 Barb. 154; *Glass v. Hurlburt*, 102 Mass. 24; *Stone v. Godfrey*, 18 Jur. 162; *Phibbs v. Cooper*, 2 L. R. H. L. 149; *McCurdy v. Brethill*, 5 Monroe 232; *Lawrence v. Beaubien*, 2 Bailey 623; *Garrard v. Frankel*, 30 Beav. 445.

3. The parol evidence received on the part of the plaintiff was inadmissible. 1st. Because it related to conversations and negotiations had prior to the execution of the contract. *Wood v. Price*, 46 Ill. 439; *Rich v. Jackson*, 4 Brown Ch. 515; *Wheaton v. Wheaton*, 9 Conn. 96; *Winch v. Winchester*, 1 Ves. & B. 375; *Maybank v. Brook*, 1 Brown Ch. 84; *Lord Irnham v. Child*, 1 Brown Ch. 92; *Lord Portmore v. Morris*, 2 Id. 219; *Hare v. Sherwood*, 3 Id. 168; 1 Ves. Jr. 242; *Jordon v. Sawkins*, 3 Id. 388; 1 Ves. Jr. 402. 2nd. Because it was indirect, inferential, and founded upon suppositions and understandings not based upon any interchange of ideas. Lord Thurlow in *Shelburne v. Inchiquin*, 1 Bro. Ch. 338; *Sutherland v. Sutherland*, 69 Ill. 481; *Potter v. Potter*, (Sup. Ct. Iowa,) 3 Cent. Law Jour. 602. 3rd. Because it is, if not incompetent, so irrelevant, so weak, as to carry with it no weight whatever. Counsel accompanied this objection with an elaborate examination of the evidence in the case.

NAPTON, J.—This is a bill in equity to reform a written contract, which was alleged by mistake not to have corresponded with the previous parol agreement of the parties, and to enjoin proceedings on a suit at law on said written instrument.

The plaintiff's petition, after reciting the fact that he had been a partner in the firm of Irons, Cassidy & Co., in which his brother, J. C. Cassidy and Irons, and one Berry and himself were equally interested, stated that he sold out, or intended to sell out, his place in said firm to the

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defendants for \$5,000, but that the contract which was executed to carry out this sale used a term which did not effectuate the intention of either of the parties; that the intent and understanding of both parties was that he was conveying only his interest (one-fourth) in the good will and prospective business of said firm, and not his share of the assets of the firm, accumulated at the date of the contract. The plaintiff, therefore, asks that the word interest, which is used indefinitely and without qualification in the written contract, be followed by the words: "in the good will and prospective profits" of the firm of Irons, Cassidy & Co. He further states that defendants have brought a suit at law on said contract, and therefore in such action have an unfair and unconscientious advantage, and asks an injunction against such proceedings.

The defendants deny the mistake; aver that the instrument was drawn up by plaintiff himself, and truly expressed the previous understanding and agreement of all parties. Both the bill and answer are sworn to.

On the hearing in the circuit court, a perpetual injunction was granted, but on appeal to the St. Louis Court of Appeals, this decree was reversed and the bill dismissed.

The testimony is very voluminous. The material facts deducible from it may be stated as substantially these: The plaintiff, wishing to sell out his position in the firm of Irons, Cassidy & Co., a commission house, dealing in the purchase and sale of live stock, about the 1st of August, 1873, wrote to Metcalf, one of the defendants, inviting him to come down to St. Louis. Metcalf and Moore were living on two adjoining farms, in Chariton county, near Brunswick, and had been jointly engaged in buying, feeding and selling live stock, and had, for some years previously, entrusted their business in St. Louis to this commission house of Irons, Cassidy & Co., and were, consequently, well acquainted with the members of the firm. The reason alleged by plaintiff for desiring to sell out and quit the business was that his confinement to the office, as

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financial manager, had injured his health, and he desired a more active life in the country. In accordance with this invitation of plaintiff, Moore, one of the defendants, came down to St. Louis, on the 5th of August, with some stock, and, after ascertaining from plaintiff the terms on which he proposed to sell, and learning something of the financial condition of the firm during the past year, and the amount of capital it would be necessary to advance, concluded to consult with Irons, Berry and A. C. Cassidy, to ascertain whether their accession to the firm, in place of W. L. Cassidy, would be agreeable to the other partners, and also whether these partners would be willing to advance them the necessary capital. They all assented, with apparent cordiality, and promptly offered, as plaintiff had previously suggested they would do, to advance to Moore and Metcalf their share of capital, charging them ten per cent. on such advance. The plaintiff had previously offered to show Moore the books, and did lead him into the office, inviting his inspection of them, but upon Moore saying that he was no bookkeeper and would probably derive very little information from them, he assured Moore, in general terms, that the profits of the concern during the previous year had been between thirty and forty thousand dollars. In the evening, before Moore's departure for Brunswick, after a very short, hasty and indefinite conversation, plaintiff sat down and wrote the following contract, which was immediately signed by Moore for him and Metcalf:

ST. LOUIS, August 7th, 1873.

Articles of agreement entered into this day by and between W. L. Cassidy, of the firm of Irons, Cassidy & Co., St. Louis, Missouri, party of the first part, and W. F. Moore and James Metcalf, of Brunswick, Chariton county, Missouri, party of the second part. The said party of the first part agrees to sell to the party of the second part his interest (one-fourth) in the firm of Irons, Cassidy & Co., a

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live stock firm doing business in the city of St. Louis, State of Missouri, the party of the second part agreeing to pay the party of the first part three thousand dollars in cash, and the remainder in a negotiable note, or young stock that they have on their farm near Brunswick, Missouri. Possession to be given on first day of September, 1873, the party of the first part to receive for the said one-fourth interest five thousand dollars—to be paid as is above described. Given under our hands this day.

(Signed)

W. L. CASSIDY,  
METCALF & MOORE.

(Witness: G. W. DOERR.)

The plaintiff, in his examination in chief by his counsel, declares that he was thinking of and using the word "influence," and intended to use that word in drawing up this instrument, but the word "interest" popped into his head just as he came to that part of the writing, and he put it down interest instead of influence; that he never heard of the term "good will," as used in this connection, at the date of this writing, and, of course, had no intention of using it. Neither Moore nor plaintiff used the term "good will," nor understood its meaning, as a technical phrase.

Moore and Metcalf moved down to St. Louis, and on the first of September, 1873, took the plaintiff's place in the firm. The books and papers of the old firm were removed by plaintiff and his bookkeeper, Doerr, to an office near by, and new books were opened by the new firm, and a new bookkeeper appointed. The plaintiff very soon started up the country, partly with a view to collect outstanding accounts of the old firm, and, when expedient, to take cattle in liquidation, and partly to purchase on speculation for himself. In this view, he from time to time, drew out the most of his share of the assets of the old firm, amounting to between eight and ten thousand dollars. On these visits he is reported to have taken occasion



to suggest some unfavorable comments on the capacity of Moore and Metcalf to supply his place in the old firm, to intimate that his trade with them was not so good a one for them as they imagined, and that the business of the new firm would fall off, as the heavy profits of the preceding year had been made by *bulling* the trade. This is denied by plaintiff. However this may be, and we may notice it hereafter, on the plaintiff's final return to St. Louis, he established another commission house in the live stock business, within a few doors of the old concern, on the 1st December, 1873. This produced great dissatisfaction on the part of the defendants, which, after various and repeated disputes, finally terminated in the suit on the contract, which it is the object of the present proceeding to enjoin.

Meanwhile, the plaintiff and his former associates proceeded to settle up the old concern, and on the 25th December, made a final division. In January, 1874, A. C. Cassidy, brother of plaintiff, complained of neuralgia, and gave notice of his intention to retire from the firm, upon which announcement Irons and Berry declared their determination to do the same. The defendants remonstrated against this, but as Cassidy was resolved, and his associates were likewise determined on following his example, there was no alternative, but to consent to a dissolution, which was formally effected on the 9th of February, 1874. At this settlement the defendants jointly were found entitled to \$3,597.16, or \$1,799.58 each.

The first question which is presented, assuming the mistake as alleged in the petition, or as proved by the evidence to have been made, is, whether the mistake is such an one as falls within the province of a court of equity to correct. It is insisted by the defendants' counsel that the mistake, either as stated in the petition or as proved, is one of law, from which a court of equity cannot relieve. It is conceded that mistakes of law, unless accompanied with fraud, misrepresentation, concealment, surprise, or

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some similar peculiarity of circumstance, furnish no ground of equity jurisdiction. The elementary maxim *ignorantia legis neminem excusat*, prevails in the administration of civil as well as criminal law, and is as potent in a court of chancery as in a common law court. There is, no doubt, a considerable difficulty in reconciling the adjudged cases on this subject, and perhaps still more in deducing from them the principle upon which the discrimination between mistakes of law and fact has rested. We shall not undertake to review them, since that task has already been accomplished by Judge Story, in the 5th chapter of his work on Equity Jurisprudence. We will simply refer to two or three cases, which seem to us, clearly to point out the distinction, so far as it is applicable to the facts of this case.

The case of *Hunt v. Rousmaniere*, (1 Peters 13,) appears to illustrate the precise points presented by the pleadings and evidence in this case. There, the plaintiff, who was asking relief, had lent a considerable sum of money to Rousmaniere, who was the owner of two brigs, and offered to give the plaintiff, in order to secure the loan, in addition to his notes, a mortgage on either or both vessels. They accordingly went together to a lawyer to have an effectual security drawn up, but upon ascertaining that a power of attorney from Rousmaniere would accomplish the same purpose as a mortgage, in the opinion of the lawyer, and to avoid the necessity of changing the vessels' papers, which a mortgage would require, the plaintiff preferred the power of attorney, which was accordingly drawn up, by consent of all parties. The death of Rousmaniere shortly afterwards, made the security selected insufficient, but the Supreme Court decided that they could furnish no relief in such a case, because the instrument selected was the very one which both parties agreed on and intended, and the only mistake was as to the legal operation of the one selected. Mr. Justice Washington takes occasion to state, however, in his opinion refusing any aid to the plaintiff, that "when an instrument is drawn and exe-

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cuted, which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction, and if the instrument which is intended to execute the agreement be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagements, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party fully to perform his agreement, according to the terms of it and to the manifest intention of the parties. So, if the mistake exists, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought." This case was the third time before the court when this opinion was delivered, and of course, was the result of mature deliberation, and its language carefully considered and it has, therefore, been regarded as a leading case, and adopted by Judge Story in his treatise on this subject, and followed by Chancellor Kent in 4 Johns. Ch. 567, and by this court in *Leitensdorfer v. Delphy*, 15 Mo. 160. It is a mistake to suppose it based on the disputed or overruled case of *Lansdowne v. Lansdowne*, (Mosely 364,) since Judge Washington takes occasion, distinctly, to repudiate some of the observations of Lord King, in that case.

The case of *Wintermute, Exr. v. Snyder's Exr.*, (2 Green. Ch. R.,) affords another illustration of the position of the

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Supreme Court of the United States in *Hunt v. Rousmaniere*. Here, there was a bequest of a certain portion of the testator's estate, on the death of his wife, to the heirs of one of his brothers, who was dead, and to Peter Snyder (another brother) and his heirs, and William Snyder and his heirs—the two brothers, Peter and William, being both then living—to be divided equally between them, share and share alike. After the death of the testator, and before the death of his wife, who had a life estate under the will in the whole property, William Snyder assigned all his interest over to Wintermute. This assignment was for a small consideration, and was executed under the mistaken impression that his interest never vested until the death of the widow, and that his children were equally entitled with himself; but, in truth, the fee simple title to the whole interest vested in William Snyder, on the death of the testator, and there was no contingency depending on the death of the widow. The Chancellor refused relief, because the instrument conveyed precisely what the parties intended, and they were merely mistaken as to what that interest was at law. At the same time the Chancellor observed, that if there had been any mistake in the agreement itself, so that it did not contain what the parties had agreed on, a very different case would have been presented, and he cites Judge Washington's opinion, above referred to, in support of this position.

The case of *Powell v. Smith*, (Eq. Cases, Vol. 14, p. 85) a recent decision of the Master of Rolls, is relied on as establishing that the insertion of the word "interest," in the contract drawn up by plaintiff, was a mistake of law, and that seems the most pointed one in this direction, it is proper to give it a particular examination. It was a contract between a landlord (or which is the same thing, his agent,) and a tenant. The memorandum, in writing, was as follows: "Terms agreed upon, this, the first of October, 1870. Lease to be for 7, 14 or — years, from the 29th of September, 1870." The construction of such an agree-

ment was well settled in England; it meant that the renewal of the lease, at the end of 7 years, was at the option of the tenant. The application to the court was made by the tenant for a lease of this character, but the landlord resisted it, on the ground that he, or his agent, understood that such agreements meant that the renewal at the end of 7 years was at the option of the landlord. There was no dispute but that the memorandum contained exactly what was intended—at all events, by the tenant—and a specific performance was decreed. Lord Romilly says: "The words of the agreement are not disputed on either side. All those cases which have been cited during the argument, are cases where there was either a dispute and doubt as to the thing sold, or where the words of the agreement expressed certain things in an ambiguous manner, which might be misunderstood by one of the parties. In all those cases the court has held that it would look at the evidence, and that if the mistake is sufficiently proved, the court will then set aside the agreement. But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now, that is no ground of mistake at all. It is a question upon the construction of an agreement, agreed to by everybody concerned."

We are unable to perceive any material conflict between this opinion of the Master of the Rolls and the American cases we have cited. Assuming the facts to be as stated, the case now under consideration falls within the reasoning of all three of the cases cited. The written agreement did not express what either party intended. The word used to express the thing sold, without qualification, did not convey the meaning of either party. The seller did not intend to part with the profits already his, nor did the buyer expect to acquire them. They were not the subject of their negotiation. The paper drawn up by the scrivener, who, in this case was the plaintiff himself, did not correspond with the verbal agreement previously



made. It is immaterial how or why, this was so, whether by a misunderstanding of the meaning of words or by sheer carelessness. The real agreement between the parties has never been reduced to writing.

It is unnecessary to go into any critical analysis of the evidence, for the purpose of determining that the parties did not make such an agreement, as the one written imports. That question can hardly admit of a doubt. To say nothing of the positive statements of the plaintiff on his examination at the trial, and the failure of the defendants, when interrogated, to make any definite statements on the point, the acts of both parties are conclusive. The application of defendants to Irons, A. C. Cassidy and Berry for an advance or loan of defendants' proportion of capital needed, at 10 per cent., is scarcely to be reconciled with the hypothesis that they had bought or supposed they had bought the defendant's interest in the assets of the old firm. Their failure to take any interest in the books, accounts and final settlement, tends to the same conclusion. That the plaintiff did not so understand the contract is plain, since, to say nothing of his whole course after the sale, it was not at all credible that, with his knowledge of the financial condition of the firm, he would have sold for \$5,000 what he knew to be worth \$8,000 to \$10,000. We have no doubt, therefore, that a mistake was made in the written contract, and one which a court of equity may reform—but whether a court will grant this aid, or, if so, upon what terms, is another question, which presents very different considerations.

It will be observed that in the extracts herein made from the carefully expressed opinion of Judge Washington, the court places the power of the courts of equity to reform contracts on the same basis as the power to enforce specific performance. It is because the verbal contract is virtually unexecuted that a reformation is asked, and when asked, the reformation of it must put it in a shape in which both parties may be compelled to perform. In the case

now under consideration, performance of the real contract is claimed by the party asking relief, and the plaintiff, being quite conscious that, in order to get relief from a court of equity, he must have already done what was equitable and just on his side, or must, at least, be ready to do so, claims that he has given everything to defendants that he sold them. What was it, then, that he sold? According to his own reiterated assertions, he sold "his place and influence" in the old firm; that the establishment of a second house, in the same line of business, within a few doors of the old house, was a palpable breach of this contract, is clear. Such an establishment was inconsistent with the exercise of the influence promised in favor of the old concern. The conversations of plaintiff, during one of his first visits up the country, after the first of September, had a strong tendency to show that he then anticipated a short career for the new firm into which he had inducted the defendants, and was already contemplating a resumption of business himself. This conversation, it is true, is denied by him—but subsequent events seem to confirm the material accuracy of the testimony on that subject, and the testimony itself bears the marks of truth and candor, and could not easily have been invented and stated in a shape to evade the rigid cross-examination to which it was subjected; and the subsequent statements of the plaintiff, in November, to one of the defendants, who had heard a rumor of the probability of plaintiff's re-establishment in the same stock yard, tends further to show the state of the plaintiff's views on this subject. He insisted that he had a right to set up in business again—that the defendants had imposed no restrictions on him in their contract; that at that time he had no intention to commence again in St. Louis, but had thought of Chicago, Buffalo, &c., and this was soon followed by his re-establishment in the same business, immediately upon his final return to St. Louis, about the first of December. So far, then, as any influence is concerned, the defendants did not get what he says he sold to them.

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Cassidy v. Metcalf.

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But, it is said, they at least got his place in the firm, and that his premature dissolution was a matter over which he had no control, and with which he had nothing to do. It is true, that there is no proof of any direct agency of his in procuring the dissolution—but the whole history of the transaction leads us to the conclusion that he was the primary and sole cause of it. His establishment of a competing house, within a few feet of the other, manifestly incompatible with his promised influence in favor of the old firm, after defendants were admitted as partners, in his place, at once opened the eyes of the defendants to the insecurity of their position and the worthlessness of their title. The dissatisfaction and alienation of feeling, consequent on this, led to repeated and unfriendly interviews with the plaintiff, and finally culminated in a suit at law. Mr. A. C. Cassidy, the brother and former partner of the plaintiff, seeing the state of feeling thus engendered between his brother and his then partners, very naturally concluded to retire from the firm, and thus avoid the unpleasant predicament of being forced to take sides, either with his brother and against his partners, or with his partners and against his brother. The other partners, Irons and Berry, old associates of the plaintiff, very naturally followed his example. In short, the entire testimony in this case shows that Irons, A. C. Cassidy, Berry and the bookkeepers, all of whom were witnesses for the plaintiff, sympathized with him in the controversy. We are far from intimating, however, that this natural feeling had the slightest effect in causing them to deviate from the truth. On the contrary, we have adopted, substantially, their view of the real contract made between these parties. We merely mention the fact, along with other circumstances heretofore stated, to confirm the conclusion that W. L. Cassidy was the leading member of the old firm, and that his controversy with the defendants naturally, and almost inevitably led to the results which ultimately deprived the defendants of all the benefits they expected

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and were entitled to derive from their trade with the plaintiff.

The dividend received by the defendants, on the dissolution of the new firm in February, we may presume was fairly earned by their services during the five months the association lasted, despite of the withdrawal of plaintiff's influence, and was probably an inadequate compensation for their losses in breaking up their business in Chariton county, and their expenses in removing to St. Louis, renting houses, &c. At all events, the plaintiff's influence contributed nothing, either to the increase of the profits or the stability of the concern, liable as it was under all circumstances, to interruption from the accidents of death or other casualties, and the mere position obtained by the contract, apart from plaintiff's influence, both in favor of its stability and its probability of yielding proportionate profits to those of former years, was worthless. We conclude that the plaintiff's conduct was not characterized by that good faith with which a party should always approach a court of equity, when asking its assistance. We do not concur, however, with the Court of Appeals in the ultimate result to which these views lead. As the contract sued on, at law, is not the contract which the parties made, the suit on it should be enjoined—but only on condition that the parties be put, as nearly as may be, *in statu quo*. This can only be done by a return of the purchase money, or rather so much of it as has been paid, we believe \$3,600. On this condition, a perpetual injunction should be granted, and we therefore reverse the judgment of the Court of Appeals, and remand the case to the circuit court, with directions to make the conditional decree above indicated. The other judges concur.

REVERSED.

GRAHAM V. PACIFIC RAILROAD COMPANY, *Appellant.*

1. **Railroads: PASSENGER, RIGHTS OF: "STOCK PASS."** A passenger who presents to the conductor a "stock pass" from the railroad company which entitles him to return on their road without payment of fare, can recover damages sustained by him, when so returning, caused by his expulsion from the cars by the conductor for non-payment of the fare, although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes, and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return.
2. ———: ———: ———. Where a passenger had the right under a "stock pass," to return on defendant's cars from St. Louis to Knob Noster, and was actually on the return trip; *Held*, that under the pass he had the right to stop at Eureka, an intermediate station, and was not liable to pay fare to the latter place.
3. ———: ———: ———. **DAMAGES, COMPENSATORY AND EXEMPLARY.** A passenger can only recover for a wrongful expulsion from the car of a railroad company, such damages as he has actually sustained, and which he could not have averted by reasonable exertion, care and prudence, unless he was ejected in a wanton, rude or aggravated manner, indicating oppression, malice or a desire to injure, in which case, he may recover punitive or exemplary damages from the company, where, after knowledge of the fact, they retain in their employ, and in the same capacity, the servant who has been guilty of such misconduct.
4. **Instructions.** Where the instructions given fully embrace all that is contained in those that are refused, this court will not reverse the judgment because of such refusal.
5. **Damages: WHEN NOT SO EXCESSIVE AS TO AUTHORIZE REVERSAL.** A judgment will not be disturbed on the ground of excessive damages, where the right to recover damages was clearly established, and it does not appear that the sum assessed is so disproportionate to the injury as to bear marks of passion, prejudice or corruption on the part of the jury.

*Appeal from Johnson Circuit Court.*—HON. FOSTER P. WRIGHT,  
Judge.

*Ewing, Smith & Pope* with *Thos. J. Portis* for appellant.



1. The injury complained of was not committed in a wanton, rude or aggravated manner, indicating oppression, malice or a desire to injure, and therefore the damages should have been compensatory only. *Engle v. Jones*, 51 Mo. 316; *Franz v. Hilterbrand*, 45 Mo. 121; *Green v. Craig*, 47 Mo. 90; *Milw. & St. Paul R. R. v. Arms*, 1 Otto (U. S.) 489; *Fisher v. Goebel*, 40 Mo. 475; *Waters v. Brown*, 44 Mo. 302; *State v. Powell*, 44 Mo. 436; *McKeon v. Citizens R'y Co.*, 42 Mo. 84; *Hamilton v. Third Av. R. R.*, 53 N. Y. 25; *Hyatt v. Adams*, 16 Mich. 180; *Day v. Woodworth*, 13 How. 371; *Turner v. North Beach, &c., R. R. Co.*, 34 Cal. 594; *Kennedy v. North Mo. R. R. Co.*, 36 Mo. 351; *Fay v. Parker*, 53 N. H. 342; *Perkins v. M. K. & T. R. R. Co.*, 55 Mo. 202; *Stillwell v. Barnett*, 60 Ill. 219; *Brown v. Allen*, 35 Iowa 306; *Moore v. Crose*, 43 Ind. 30; *Lucas v. Flinn*, 35 Iowa 9; *Smith v. Pitts., &c., R. R. Co.*, 23 Ohio 10; *Wallace v. Mayor, &c., of N. Y.*, 2 Hilt. (N. Y.) 440; *Tripp v. Grouner*, 60 Ill. 474; *Wanamaker v. Bowes*, 36 Md. 42; *Phil., &c., R. R. Co. v. Quigley*, 21 How. 202, 214; *Dibble v. Morris*, 26 Conn. 416; *Dean v. Blackwell*, 18 Ill. 336; *Peoria Bridge Ass. v. Loomis*, 20 Ind. 235; *Ously v. Hardin*, 23 Ill. 403; *Baltimore, &c. R. R. Co. v. Blocher*, 27 Md. 277; *Hopkins v. A., &c., R. R. Co.*, 36 N. H. 9.

Conjectural damages are never allowed. Damages must be certain, and not possible, or even probable, to be the subject of recovery. *Sedgw. Meas. Dam.* 46, 47 (6th Ed.) The verdict was rendered for vindictive and punitive damages, and not merely for compensatory damages, or for conjectural damages, which was erroneous. There is no rule of law that would authorize the jury, under the evidence, to find a verdict for eight hundred dollars. *Whalen v. Cent. Church*, 62 Mo. 326. The defendant was not liable for the trespass of its said conductor, even if he was guilty of a willful and malicious wrong, unless defendant either authorized or ratified the act of its said conductor, of which there is not the slightest evidence.

*A. B. Jetmore* for respondent.

The damages, as assessed by the jury, are not excessive. In personal actions, the damages are not, strictly speaking, merely compensatory, i. e. for the actual outlay of money, &c., but includes all injuries—manner of expulsion, mental anguish, bodily pain, the violation of personal liberty, expenses for medical attention, &c., &c, *Chandler v. Allison*, 10 Mich. 460; 11 Mich. 542; 16 Wis. 280; 25 Ind. 321; 5 R. I. 299; 52 Penn. 238; 55 Ill. 185; 39 Ind. 509; 10 Barb. (N. Y.) 621; 53 Penn. St. 276; 48 N. H. 541; 54 Ill. 19; 1 Smith (N. Y.) 415; 2 Greenlf. Ev. §§ 272, 268. Hilliard on Torts 466, § 13. But this court will not interfere unless the damages are clearly excessive, even in cases where exemplary or punitive damages are inadmissible. 2 W. Black. 942; 3 Burr. 184; 4 T. R. 651; *Sargent v. —*, 5 Cowen 106; *Coleman v. Southwick*, 9 Johns. 51; *McConnell v. Hampton*, 12 Johns. 235-6; *Mason* 497; *Whalen v. St. Louis, K. C. & N. R. R.*, 60 Mo. 323.

NORTON, J.—This suit was commenced in the circuit court of Johnson county. It was substantially alleged in plaintiff's petition that he had shipped one or more car loads of stock over the defendant's road from Knob Noster station to St. Louis, and in consideration of the freight paid by him to defendant, he was furnished with a "stock pass" from St. Louis to Knob Noster, by defendant; that plaintiff having said pass in his possession, and while the same was in force, was admitted into a passenger car of a train of defendant, bound from the city of St. Louis to Knob Noster; that the defendant, by one of its passenger conductors, having charge of said train, refused to honor said "stock pass" when presented by plaintiff, and refused to transport plaintiff from said city of St. Louis to Knob Noster, and unlawfully, wantonly and willfully did expel the plaintiff from said car in a disgraceful manner, and

with contemptuous usage and insulting language, &c., to the damage of the plaintiff in \$5,000.

There were two counts in the petition, in substance the same, being but one cause of action. The answer was a general denial of the allegations in the petition. There was a trial by jury, resulting in a verdict and judgment for plaintiff for \$800, and a motion for new trial having been overruled, defendant brings the cause here by appeal. The testimony tended to show that the plaintiff had shipped a car load of stock from Knob Noster to St. Louis over defendant's railroad, and had received from defendant a "stock pass" from said city of St. Louis back to Knob Noster; that the plaintiff, while said pass was in force and in his possession, entered a passenger car in what was known as the Washington accommodation train, in charge of conductor Eveland, with intent to go to Eureka, an intermediate station between St. Louis and Knob Noster stations; that, after the said train was under way, the said conductor proceeded to collect passes or fare of the passengers, and, when he came to where plaintiff was sitting, plaintiff offered said "stock pass" which said conductor declined to honor, and stated to the plaintiff that he could not honor the same under his orders, and that plaintiff must pay the usual fare to Eureka, which plaintiff refused to do; that the said conductor then stated to plaintiff that he could not carry him unless he paid his said fare, and that he must leave the car if he did not so pay; that plaintiff refused to pay said fare so demanded, and said conductor stopped said train, and plaintiff got off at Taylorwick station, distant about one mile from the St. Louis stock yards. There was no force employed in expelling the plaintiff from the car. The hour the plaintiff got off of said train was between five and six o'clock in the evening. There was a depot for passengers at Taylorwick station. Plaintiff walked back to the stock yards, where he remained till the following day, when he went west on defendant's train, having purchased a ticket for that purpose.

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The testimony tended further to show that the weather was cold, with snow on the ground, and that plaintiff, in order to get suitable lodgment for the night, walked back to the stock yards, a distance of from one to three miles; that he was put off the train about dark, was known as a stock dealer, had about \$400 on his person, and was made sick by becoming overheated, was feeble and unable to do much for two or three months; that the expulsion of plaintiff from defendant's car was without force, and that the conductor acted under the belief that he was not authorized to receive the pass.

The court gave eight instructions on plaintiff's motion over defendant's objection, the first and second of

1. RAILROADS: which are to the effect that, although the passenger, right of: "stock pass," jury might believe that the conductor ejected Graham under an honest misunderstanding of an order issued by defendant, yet, if they believe that the plaintiff, being engaged in shipping stock over defendant's road, had received a stock pass from defendant entitling him to ride on the road from St. Louis to Knob Noster, without payment of fare, and that he presented said pass to the conductor in charge of the train which he refused to receive, and then ejected plaintiff, they would find for plaintiff. In the third instruction they were told that it was not necessary that physical force should have been used on the occasion, but that if the pass was in full force, and the conductor refused to honor it, stopped the train and ordered plaintiff to leave the car, and that he left in obedience to the command, that in law it constituted an ejection, and that, under the pass entitling plaintiff to be carried from St. Louis to Knob Noster, defendant was bound to carry plaintiff from St. Louis to any other point between St. Louis and Knob Noster, and that it was no excuse for his expulsion,

2. —: —: that he only intended to ride on that train to —: Eureka, if he was actually on his return trip to Knob Noster.

We cannot perceive the force of any objection to the

above declarations, and the counsel for defendants rely chiefly for reversal on the action of the court in giving, as it is claimed, instructions four and seven, the last mentioned of which is to the effect that, if the offense complained of was willfully committed, then the jury had the right to give damages "as a punishment to the defendant for the purpose of making an example and as a warning to others," in addition to compensatory damages for the injury. In cases of this kind, when there is no evidence tending to show willfulness or other circumstances of aggravation, the damages should only be compensatory, but when the act is aggravated, and there has been oppression, fraud, malice or willfulness, evincing an intent to injure, damages may be allowed not only to compensate the sufferer, but punish the offender. *Franz v. Hiltbrand*, 45 Mo. 121. And corporations, like individuals, are liable to exemplary damages when the facts of the case will warrant the jury in finding them. *Malecek v. Tower Grove R. R. Co.*, 57 Mo. 17. In point of fact, however, no such declaration as is complained of by defendant, was given. Upon a careful examination of the record, it appears that instruction seven, on the subject of punitive damages, was refused, and is therefore, not before us. The only instruction given on the part of plaintiff in reference to damages, is as follows: the jury are instructed that, if they find for plaintiff, in assessing his damages, they may take into consideration all the circumstances attending the expulsion of plaintiff from the car of defendant. It is also insisted by counsel that the court erred in giving instruction No. 4, to the effect that the ejection of plaintiff by the conductor, on his refusal to pay fare after the rejection of the stock pass, constituted in defendant gross negligence, and for which it is liable, although they might believe that the conductor acted from an honest misunderstanding of an order from his superior. The record before us shows that this instruction was not given, and hence it is unnecessary to examine the question in-



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volved in it. It is also urged that the court erred in refusing instructions 6, 7, 8 and 9, asked for by defendant, the 9th of which is as follows: 9th. The court instructs the jury that the pass read in evidence was a contract to carry the plaintiff from St. Louis, Mo., to Knob Noster, Mo., and that, if they believe from the evidence that the plaintiff when he got on the cars intended to go only to Eureka on that train, and not to Knob Noster, as his said pass read, and so informed the conductor, and claimed the right to be carried free from St. Louis to Eureka, (an entirely different place from that named in the said pass,) on said pass, then, that was an abandonment by the plaintiff himself of the original contract, and, at the same time, an attempt on his part to make an entirely new and different contract, under and by virtue of the said identical pass or original contract, which he had no right in law to do, and that the said conductor had right, and it was his duty to refuse to enter into such new contract, and to require the plaintiff to pay the usual fare from St. Louis to Eureka, to which place the plaintiff had said he was going, and upon his refusal to do so, it was both the right and the duty of the said conductor to put plaintiff off the cars, and the jury must find for the defendant. If plaintiff had a right to ride under his pass in defendant's car from St. Louis to Knob Noster, he had the right to stop at any intermediate point, and as the evidence showed that Eureka was such a point, and that plaintiff was actually on his return trip to Knob Noster, the instruction was properly refused.

We cannot see any well grounded complaint against the action of the court in refusing instructions Nos. 6, 7 4. INSTRUCTIONS. and 8, as the following were given, viz:

2. The court instructs the jury that this is an action by the plaintiff for a breach of contract by defendant to transport and carry plaintiff as a passenger from St. Louis to Knob Noster, and if they find the issue for the plaintiff, then the plaintiff can only recover whatever damages he

may show he has actually sustained, and which he could not have averted by reasonable exertion, care and prudence on his part, unless plaintiff was ejected in a wanton, rude or aggravated manner, indicating oppression, malice or desire of revenge.

3. Although they may believe, from the evidence, that defendant was guilty of a breach of contract in ejecting plaintiff from its car, yet, if they further believe, that the conductor in putting him off was acting in obedience to the orders of his superior officers, or what he honestly believed such orders to be, and so believing, refused to carry plaintiff any further, and caused him to leave the cars at a depot or usual stopping place, or near any dwelling house, or at any other suitable stopping place, and that the conductor, in so doing, did not act in a rude, wanton or aggravated manner, indicating oppression, malice or a desire to injure, the plaintiff cannot recover punitive or vindictive damages, and cannot recover any damages beyond a compensation for the money actually expended by him during his detention, and the subsequent passage home, and for the reasonable value of his time necessarily lost in consequence of said ejection, and other expenses necessarily incurred.

4. Unless the jury are satisfied from the evidence that plaintiff, soon after his ejection, was taken and affected with a bad cold and ill-health, and that such cold and ill-health was the immediate cause or result of his ejection, and not produced by any subsequent and unnecessary act of plaintiff, they will disregard and not take into consideration any expenses for medicine or loss of time which plaintiff may have incurred, if any, on account of the same, nor will they assess any damages on account of such cold or ill-health.

5. The pass, read in evidence, only entitled plaintiff to ride on defendant's cars when returning from St. Louis to Knob Noster, \* \* and, if plaintiff was not at the time of his ejection so returning, and was not on his

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way back, and the conductor ejected him solely on that account, then they should find for the defendant.

These instructions fully embrace all that is contained in Nos. 6, 7 and 8, the refusal of which is urged as error. They place the question of damages before the jury in the most favorable light for the defendant. The verdict of the jury was for \$800, and it is insisted that the judgment should be reversed, because it is claimed the damages are excessive.

It was held by this court in the case of *Kennedy v. North Mo. R. R. Co.*, 36 Mo. 351, "that before we are at liberty to interfere with a verdict, it must appear at first blush that the damages are flagrantly excessive, or that the jury acted from partiality, prejudice or passion. When there is any evidence to support the verdict, it will not be disturbed, but the court will interfere when there is no evidence, or when the court gives an instruction not authorized by the evidence." In the case before us, plaintiff's right to recover damages was clearly established, and it does not appear to us that they are so flagrantly excessive, or that the sum assessed is so disproportioned to the injury as to bear marks of passion, prejudice or corruption, on the part of the jury, and, because we cannot say this, the judgment cannot be disturbed on the ground of excessive damages. It may also be observed in this connection that the evidence shows that Tallmage, the superintendent, who issued the order to the conductor, and under which he acted in ejecting plaintiff, stated in a letter written to plaintiff the day after his expulsion, "that the orders issued were to honor all such passes during the number of days specified in them." This order was not produced on the trial, and the conductor testified that it was to the effect "that on and after the 10th of January, 1872, stock passes are given to persons to go with their stock and take care of it, and are not good on passenger trains." If the orders were such as Tallmage in his letter stated them to be, then the act of the conductor in expell-

5. DAMAGES: when not so excessive as to authorize reversal.

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Ex Parte Bethurum.

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ing the plaintiff on the 12th of January, from the car was willful and malicious, that is, the wrongful act was done intentionally and knowingly, for the pass of plaintiff on its face showed it to be good till the 19th of January, and had seven days to run when he was ejected. It was also in evidence that the order was produced on a former trial of the cause, and a witness, who kept the minutes of the evidence on that trial, testified that the words "such passes were not good on passenger trains," were not contained in the order. These matters were in evidence, and were before the jury for their consideration, and if they reached the conclusion, as they might have done, that the act of the conductor in the expulsion of plaintiff was wanton and willful, they would have been justified in giving exemplary damages as it appeared from the evidence that defendant still retained him in their employ in the same capacity after they had knowledge of his act. *Perkins v. M. K. & T. R. R.*, 55 Mo. 201.

Since the rendition of the judgment, and since the appeal from it to this court, plaintiff has died, and the cause has been revived in the name of his executrix, Lucinda Graham, who has been substituted as party plaintiff. Judgment affirmed, in which the other judges concur.

AFFIRMED.

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EX PARTE BETHURUM.

1. **Ex post Facto Laws.** The phrase defined (*following Calder v. Bull*, 3 Dallas 386.)
2. **Retrospective Laws.** The constitutional prohibition against the enactment of laws retrospective in their operation, relates to such as concern civil rights and remedies, and not such as concern crimes and punishments or criminal procedure. Constitution of 1875, Art. 2, § 18.
3. **Habeas Corpus:** CORRECTION OF JUDGMENTS IN CRIMINAL CASES:

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Ex Parte Bethurum.

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CONSTITUTIONAL LAW. The act of March 1st, 1877, (Sess. Acts, p. 261,) requiring any court to which application is made by *habeas corpus* for the release of any prisoner confined under a sentence which is erroneous as to time or place, to sentence him to the proper place of imprisonment or for the correct length of time, authorizes the correction of erroneous sentences passed previous to that date, and is not void either as an *ex post facto* law or as retrospective in its operation.

4. **Jurisdiction and Practice in Supreme Court in Habeas Corpus Cases.** The foregoing act is not void as conferring original jurisdiction on the Supreme Court. That court has, under the constitution, original jurisdiction in *habeas corpus* cases, and the act is substantially an amendment to the *habeas corpus* act, prescribing the practice in such cases.

*Petition for Habeas Corpus.*

N. C. Kouns for petitioner insisted that the act of March 1st, 1877, ought not to be construed as applying to sentences previously passed, as such construction would make it obnoxious to the inhibition of the constitution against *ex post facto* and retrospective laws, citing *Costin v. Corporation of Washington*, 2 Cranch C. C. 254; *U. S. v. Hall*, 6 Cranch 171; *Calder v. Bull*, 3 Dall. 386; *Cooley Const. Lim.* 272, 370; *Hope Mut. Ins. Co. v. Flynn*, 38 Mo. 483.

2. The Supreme Court is a constitutional tribunal, and a statute cannot enlarge its constitutional powers so as to authorize it to sentence a criminal at all, or to modify a criminal sentence, except upon error or appeal. This statute undertakes to give this court power to impose an original sentence where the trial court failed to do so.

J. L. Smith, Attorney-General, for the respondent, insisted that the act is not an *ex post facto* law, according to the definition given in *Calder v. Bull*, 3 Dall. 386, and adopted in *Fletcher v. Peck*, 6 Cranch 87; *Ogden v. Saunders*, 12 Wheat. 213, 266; *Satterlee v. Mathewson*, 2 Pet. 380; *Cummings v. Missouri*, 4 Wall. 277; *ex parte Garland*, 4 Wall. 333; *Huber v. Reily*, 53 Penn. St. 115; and that the



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Ex Parte Bethurum.

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power given by it is virtually part of the *habeas corpus* act, and is welded on to the jurisdiction conferred by that act.

HENRY, J.—At the November term, 1875, of the Buchanan circuit court, Bethurum was tried and convicted of forgery in the third degree, and sentenced to imprisonment in the penitentiary for a term of eight years, the maximum punishment for that offense being fixed by law at seven years imprisonment in the penitentiary, and he now asks to be discharged from said imprisonment on the ground that it was illegal. It is conceded that under the decisions of this court, in *ex parte Page*, 49 Mo. 291; *ex parte Jilz*, 64 Mo. 205, the petitioner is entitled to his discharge, if the act of the General Assembly, approved March 1, 1877, entitled "An act to prevent the discharge of persons by the *habeas corpus* act, who have been convicted of crime and erroneously sentenced," be an *ex post facto* law, or retrospective in its operation, in the sense in which these terms are used in our State constitution. By the terms of the act, it relates to sentences which had been pronounced when it was enacted, as well as to those thereafter to be pronounced. The preamble, reciting that many persons had been erroneously sentenced, and were liable to be discharged at any time, by virtue of the provisions of the *habeas corpus* act, declared the existence of an emergency requiring the act to be in force and to take effect from and after its passage. The first section provided that "No person shall be entitled to the benefit of the provisions of the *habeas corpus* act, for the reason that the judgment, by virtue of which such person is confined, was erroneous as to time or place of imprisonment; but in such cases it shall be the duty of the court, or officer, before whom such relief is sought, to sentence such person to the proper place of confinement, and for the proper length of time, from and after the date of the original sentence, and to cause the officer, or other person having such prisoner in charge, to convey him forthwith to such

designated place of imprisonment." The act took effect from and after its passage.

By the constitution of the United States, the several States are inhibited from passing "any *ex post facto* law, or law impairing the obligation of contracts." By the 18th section, article 2, of the constitution of this State, the General Assembly is prohibited from passing any *ex post facto* law, or law impairing the obligation of contracts, or retrospective in its operation. With regard to *ex post facto* laws, and laws impairing the obligations of contracts, there was no necessity for an inhibition in our State constitution, for under the prohibition in the constitution of the United States, all such laws enacted by the Legislature of a State, would be inoperative and void; but there was no such inhibition in the Federal constitution in regard to retrospective laws, and therefore that clause in the section is to be construed so as to effectuate the purpose of the framers of the constitution. When words, which have long had a technical meaning, as used in statutes and judicial proceedings, are employed in constitutions and statutes, they are to be understood in their technical sense, unless there be something to show that they were employed in a different sense.

The terms *ex post facto* and retrospective, as employed in statutes and constitutions, had acquired a definite, legal meaning, long before the adoption of our constitution. In *Calder v. Bull*, 3 Dallas 386, Chase, J., said: "The expressions '*ex post facto* laws,' are technical; they had been in use long before the revolution, and had acquired an appropriate meaning by legislators, lawyers and authors." Blackstone in his Commentaries, 1 Vol. 46, thus defines the meaning of the expression, "*ex post facto* law:" "When, after an action, indifferent in itself, is committed, the Legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it." In *Calder v. Bull*, 3 Dallas 386, Chase, J., declared an *ex post facto* law to be one which

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makes an action done before the passage of the law, criminal, which was innocent when committed, and punishes the individual who had committed it; or which aggravates a crime and makes it greater than it was when committed; or which changes the punishment and inflicts greater punishment than the law annexed to the crime when committed; or which alters the legal rules of evidence, and makes less or different testimony than the law required at the time of the commission of the offense, sufficient to convict the offender. It will be perceived that Judge Chase gave a much broader signification to the expression than was attached to it by Blackstone, and the explanation given in *Calder v. Bull*, has been accepted generally, and we believe everywhere in the United States, without an exception, where the question has been before the courts. The act of March, 1877, did not make an act criminal which was innocent before its passage; it did not make the crime, of which defendant was found guilty, greater than when he committed it; it did not change the punishment and inflict greater punishment than the law annexed to the crime when he committed it; nor did it alter the legal rules of evidence, and make less or different testimony than the law required when he committed the offense, sufficient to convict him. It merely provides that if sentenced to confinement in a place different from that required by law, the court before whom he might be brought on a *habeas corpus*, should sentence him to confinement in the proper place, and if sentenced for a longer term than the law authorized, the court should sentence him for the proper time. It simply provided for the correction, by such court, of an error patent upon the record. It is not an "*ex post facto* law," as that expression had been explained by the law writers, and in numerous adjudged cases, before our constitution was adopted.

Is it a retrospective law? All *ex post facto* laws, and laws impairing the obligation of contracts are, literally, retrospective; but not in the technical sense of that term.

*Ex post facto* laws relate exclusively to crimes and punishments, and criminal procedure. A "law retrospective in its operation," as the phrase is employed in our bill of rights, is one which relates to civil rights, and proceedings in civil causes. The inhibition as to retrospective laws, in regard to criminal transactions, was full and complete in the inhibition against the passage of *ex post facto* laws, but as there was nothing in the federal constitution to prohibit the Legislature from enacting retrospective laws, and doubts had been expressed as to the power of the Legislature to pass such laws, when the State constitution did not forbid it, that clause was inserted in our constitution to make certain what was, before, in some doubt, and is to be found in the constitutions of several of the other States, while others do not contain any such provision. A retrospective law, as the phrase is employed in our constitution, is one which relates exclusively to civil rights and remedies. In *Rich v. Flanders*, 39 N. H. 312, Sargeant, J., delivering the opinion of the court, said, after citing many cases: "From all these decisions we conclude that the word 'retrospective,' as used in our bill of rights, and as generally used in a legal sense, is a technical term, not to be understood in a literal sense, but one that must receive, and has received, a legal interpretation." Again he says: "As we understand the construction given by our courts to the last clause of our bill of rights, which provides that no retrospective law shall be made 'for the punishment of offenses,' it is held to be synonymous with the clause in the United States constitution, which provides that no State shall pass 'any *ex post facto* law.'" In *Woart v. Winnick*, 31 N. H. 473, Richardson, C. J., speaking of the same clause in the New Hampshire constitution, observes: "The most attentive examination we have been able to give the clause in the constitution we are now considering, has satisfied us that it was intended to prohibit the making of any law prescribing new rules for the decision of existing causes, so as to change the ground of the action, or the nature of the defense."

By the constitution of Texas it was provided that: "No retrospective or *ex post facto* law, or law impairing the obligation of contracts, shall be made." And in *De Cordova v. The City of Galveston*, 4 Tex. 470, Hemphill, C. J., said: "*Ex post facto* laws, and such as impair the obligation of contracts, are retrospective; but there may be retrospective laws which are not necessarily *ex post facto*, or which do not impair the obligation of contracts; and by the use of the term 'retrospective,' cases were, doubtless, intended to be included, not within the purview of the two former classes of laws." The opinion of the learned judge in that case is a very able one, and the section of the constitution of Texas, under consideration then, was very similar to our own, on the same subject. Bouvier says (2 vol., page 475), speaking of retrospective laws: "They are generally unjust, and are to a certain extent, forbidden by that article in the constitution of the United States, which prohibits the passage of *ex post facto* laws, or laws impairing the obligation of contracts. The right to pass retrospective laws, with the exceptions above mentioned, exists in the several States according to their own constitutions, and they become obligatory, if not prohibited by the latter."

The constitution of 1865, Sec. 28, of the bill of rights, declared that "no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, can be passed;" yet in all the heated discussions which grew out of the provisions of that instrument imposing test oaths, it was never urged that those provisions were in conflict with that section. It is true that the test oaths were required, not by an act of the Legislature, but by the constitution itself, yet surely the framers of that instrument did not use the phrase "law retrospective in its operation" in its literal sense, and as applicable alike to crimes and criminal procedure, and civil obligations and proceedings in civil cases, otherwise they would be chargeable with having done the very thing which they had for-



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bidden in section 28. It was evidently supposed, by the authors of the provisions, which were complained of as proscriptive and unconstitutional, that, not having declared the acts crimes, which they required ministers and others to swear that they had not committed, they had evaded the *ex post facto* provision of the constitution of the United States. There was room for discussion on that question, but if the clause, "law retrospective in its operation," applied equally to crimes and contracts, it was most flagrantly in conflict with the 28th section. We conclude, therefore, that in the constitution of 1865, that phrase was used, as we have interpreted its meaning in the present constitution. It is scarcely to be presumed, that the framers of that constitution, by that clause meant that no retrospective law, in the broad and literal sense of that phrase, should be passed, and in the same instrument proceeded to impose disabilities for acts previously committed, and provided for ascertaining who of the proscribed classes had committed them, by the oath of all who desired to pursue the avocations of lawyer, minister of the gospel or teacher. While the convention was composed of patriotic citizens, who, no doubt, had the good of the country at heart, there were also among them very able and learned lawyers, who thoroughly understood the language they employed. To contend that the convention intended that the expression, "law retrospective in its operation," was used in a sense which would embrace all legislation inhibited by the constitution of the United States, under the denomination of "*ex post facto* laws and laws impairing the obligation of contracts," which are also, expressly, in the same section of our bill of rights inhibited, is to attribute to the members of the convention ignorance of the meaning of the words employed by them, which we are not inclined to credit. Taken in connection with the other clause of the same section, we think there can be no doubt that the phrase "law retrospective in its operation," as used in the bill of rights, has no application to crimes and punish-

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ments, or criminal procedure, and that the act of March, 1877, is neither an *ex post facto* law nor a law retrospective in its operation. It is a less difficult task to determine whether the act of 1877 is a retrospective law, or not, than to lay down a rule aptly and exactly to govern all cases, and we shall make no such attempt. The case we are considering does not require it, even if we had the capacity for the performance. Does it attempt to confer original jurisdiction upon this court? By the constitution, the Supreme Court, except in cases otherwise directed by the constitution, has appellate jurisdiction only. But, by the third section, article 6, it is *otherwise directed* in regard to writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and other original remedial writs, which it has power, under that section, to issue, and to hear and determine. The act of 1877 is an amendment to the *habeas corpus* act. While the General Assembly cannot enlarge or diminish the jurisdiction of this court, conferred upon it by the constitution, yet by the constitution, this court is authorized to issue writs of *habeas corpus*, and to hear and determine them. The practice and proceedings on these original remedial writs, is regulated by the General Assembly, and has been since the organization of our State government, and the passage of the act in question was but the exercise of a legislative power which has never been questioned. The Supreme Court, by the constitution, has appellate jurisdiction, but the constitution did not attempt to prescribe the practice in this court in cases brought here by appeal or writs of error, but left it to be regulated by the General Assembly; and this court could as well disregard the act regulating practice in the Supreme Court, as it could the act prescribing the practice in *habeas corpus* cases. Such legislation is binding upon this court, when it is a legitimate exercise of the power to regulate that practice, and not an attempt, under that guise, to abridge or enlarge the jurisdiction of the Supreme Court, conferred by the constitution.

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The petitioner's prayer, to be discharged from the custody of the warden of the penitentiary, is therefore refused; and, proceeding to pass the sentence, which the court below should have passed upon him, it is by this court ordered and adjudged that said Benjamin F. Bethurum having, on the sixth day of November, 1875, been found guilty of forgery in the third degree, in the circuit court of Buchanan county, by a jury duly empaneled to try him, on an indictment preferred against him in said court, be confined in the penitentiary of the State of Missouri, for the period of seven years, from the 16th day of November, 1875, that being the date of the erroneous sentence passed upon him, and that the marshal of this court, without delay, remove and safely convey said Benjamin F. Bethurum to said penitentiary, there to be kept, confined and treated as directed by law, and that the warden of said penitentiary receive and safely keep said Bethurum, in the said penitentiary, until this sentence of the court herein be complied with, or until he shall be otherwise discharged by due course of law. All concur.

PRISONER REMANDED.

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PHELPS V. MCNEELY, *Appellant*.

**Distribution of Partnership Assets.** A partner sold his interest in the firm to his co-partner, who agreed to pay the firm debts. The firm was at the time insolvent. After the sale the continuing partner gave a deed of trust on all the assets of the late firm to secure the payment of an individual indebtedness of his own, which accrued prior to the dissolution. In a contest between a creditor of the firm and the individual creditor, *Held*, that the right of the former to be paid out of the firm assets in preference to the latter was not impaired by the dissolution, and as against him the deed of trust was a nullity.

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*Appeal from Andrew Circuit Court.*—HON. HENRY S. KELLEY,  
Judge.

*J. D. Strong* for appellant, cited *Caldwell v. Scott*, 54 N. H. 414; *Tenney v. Johnson*, 43 N. H. 144; *Rogers v. Batchelor*, 12 Pet. 230; *Sauntry v. Dunlap*, 12 Wis. 364; *Conroy v. Woods*, 13 Cal. 631; *Story on Partnership*, 97; *Taft v. Buffum*, 14 Pick. 322; *Clark v. Houghton*, 12 Gray 38; *Pierce v. Wilson*, 2 Iowa 20.

*S. E. Carter* for respondent.

NORTON, J.—The appellant in this case brought his suit by attachment against the firm of Clark & Bowers, in the Buchanan court of common pleas. The attachment was levied upon certain goods and chattels, as the property of the firm. The respondent, Phelps, appeared and filed an interplea in which he claimed a portion of the property thus levied upon, under a deed of trust executed by Clark, to secure the payment of a debt which Clark owed one Cooper. The answer to this denied the right of Phelps to the property, or that Clark owed Cooper, or had ever executed a note, and alleged that the deed of trust was without consideration, was fraudulent, and was made to hinder and delay the creditors of Clark & Bowers. The venue of the cause was changed to the Andrew circuit court, where, upon a trial, judgment was rendered in favor of plaintiff, Phelps, from which the defendant has appealed to this court, motions for new trial and in arrest of having been overruled. The defendant seeks a reversal of the judgment because of the alleged errors of the court in receiving and rejecting evidence, and in giving and refusing instructions. The objection made to the reception in evidence of the deed of trust, and the return of the sheriff showing what property had been seized by him by virtue of the attachment writ, are too frivolous and technical to require further notice, than to say that they were properly

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overruled. Defendant offered to prove the contents and appearance of a memorandum book which had been produced by Cooper on a former trial. This was objected to on the ground that the book itself was the best evidence, and until its absence or loss, if lost, was accounted for, the evidence offered was but secondary. The court ruled properly in excluding this evidence, defendant not having laid the proper foundation for its introduction. Besides this, witnesses Grubb and Strong were allowed to state what Cooper had testified to in regard to it at a former trial of the cause, Cooper having been previously asked what he had sworn to concerning it on said trial.

The evidence in the case shows that prior to the 14th of March, 1871, Clark and Bowers were partners in conducting a saloon in St. Joseph, and that they were indebted on partnership account to defendant McNeely in the sum of \$387.10. On that day Bowers sold to Clark his interest in the partnership business and property on the following terms, viz: Clark was to pay Bowers the sum of \$125, and pay all the partnership debts, the principal one of which was the debt due to McNeely. The evidence strongly tends to show that it was understood at the time, and previous to the consummation of the bargain between Clark and Bowers, that Clark was to execute a mortgage on the property to secure McNeely's debt, and that McNeely was, in that event, to release Bowers and look to Clark for his debt; that Clark on the same day, and prior to the consummation of the agreement between Clark and Bowers, had told McNeely that Bowers would not sell to him unless he, McNeely, would release Bowers, and promised to execute to McNeely a mortgage if he would release Bowers, and that McNeely agreed to do this when the mortgage should be executed; that on the 14th of March, 1871, Bowers executed and delivered a writing to Clark which recited the dissolution, and the fact that he had sold his interest to Clark for the consideration of \$125, and the further consideration that he should pay the part-



nership debts. The evidence also tends to show that at the time this agreement was made, Clark was indebted to Cooper in the sum of about six hundred dollars as his own individual private debt; that a portion of this debt was for money loaned by Clark to enable him to buy Bowers' interest in the firm, and \$83 of it was applied to the payment of rent then due by the firm, and for which McNeely was bound as security. Clark swears that he told McNeely he had borrowed this money of Cooper, and McNeely testifies to the contrary, and that Clark told him he had borrowed the money of one Gill. The evidence shows that Clark & Bowers were at that time, and still are, insolvent, and that Clark did not execute a mortgage to McNeely; that on the 16th of March, 1871, two days after the dissolution, Clark executed to Phelps, the plaintiff, a deed of trust on the partnership property for the purpose of securing Clark's individual debt of \$600 to Cooper; that Cooper had, about one week prior to the dissolution, applied to Clark and requested him to execute a mortgage to secure his debt.

The chief error complained of, and brought to our attention, was the refusal of the court to give the following instruction: "If the jury believe from the evidence, that on or about the 14th day of March, 1871, defendants Clark & Bowers, (in the attachment suit,) were co-partners in business, and as such co-partners were the owners of the property in controversy herein, and that at the time they were insolvent, and had no other property or assets with which to pay their firm debts; that said Clark & Bowers were at the time as such partners, indebted to said J. D. McNeely in about the sum of \$387.10, and that with a knowledge of these facts, Clark purchased of Bowers his interest in the partnership effects for the purpose of enabling the said Clark to transfer said partnership property to interpleader, Phelps, to secure the payment of an individual debt due from Clark to Cooper, and that in pursuance of such purpose on the part of Clark, the deed of

trust read in evidence was executed to secure the debt due from Clark to Cooper, then such transfer from Clark to Phelps was fraudulent and void as to said McNeely, and the jury will find for defendant in the interplea." It was held in the case of *Flanagan v. Alexander*, 50 Mo. 50, that one partner has no authority or power whatever, without the consent of his co-partners, to appropriate the assets of the partnership to the payment of his individual indebtedness. While a partner can dispose of the property by a *bona fide* sale, he cannot appropriate it without the consent of his co-partners, to the payment of his individual debts, either with or without knowledge of the creditor that such property was partnership property. *Ackley v. Staehlin*, 56 Mo. 561. In the distribution of partnership assets, partnership creditors have a preference over individual creditors, and individual creditors have a corresponding preference in reference to individual property. It is, however, argued that, inasmuch as Bowers had sold out to Clark with the condition that Clark was to pay the partnership liabilities, the partnership property thus received by him was released from the operation of this rule. It must be conceded that, if Clark, prior to his purchase of Bowers, had executed the deed of trust in question on the partnership property to secure the payment of his own debt to Cooper, without the consent of Bowers, he would have taken no interest therein by virtue thereof, except what might have remained over to Clark after the payment of all the firm liabilities as his share. The mere fact that the partnership was dissolved, and that Bowers retired from the firm after selling his interest to Clark on the condition that he was to pay partnership debts, would not authorize Clark to apply the property thus acquired to the payment of his individual antecedently contracted debt to the exclusion of the firm creditors; and their right to be first paid out of the assets to the exclusion of individual creditors, would not be impaired any more by an application of the firm assets after its dissolu-

tion under the above circumstances, by one partner to the payment of his own debt, than if such application had been made before the dissolution. The question here raised is thoroughly discussed in 43 N. H. 144, *Tenney v. Johnson*, in which the court, after stating that it was settled that the effects of the firm in the hands of a surviving partner remained subject to the prior claim of partnership creditors as against creditors of the surviving partner, speaking through Justice Bellows, say: "The question then arises, if one of the partners voluntarily retires from the firm, releases all his interest, and receives from the remaining partner an obligation to pay all its debts, does the right of priority still continue in the partnership in respect to such assets, or in other words, is there no substantial difference between such a case and that of surviving partners? In both cases the legal title to the assets is vested in the remaining partner, in one by operation of law, and in the other by the act of the parties, and in either case the remaining partner has the full power of sale for proper purposes. So in both cases he is bound to pay all the company debts, and so far as the creditors are concerned by the same obligation, namely, by his partnership promise. If it be held that this right of priority may be defeated by a sale from one partner to another, it is easy to see that it would be a most convenient mode of evading a principle that is held to be salutary." Each partner has the right to have the partnership property applied to the due discharge and payment of all firm debts and liabilities, before anyone one of the partners or his individual creditors can claim any right or title to them. Hence, it follows that no separate creditor of any partner can acquire any right, title or interest in the partnership stock, funds or effects by process or otherwise, merely in his character as such creditor, except for so much as belongs to that partner as his share or balance after all prior claims thereon are deducted and satisfied. Story on Part., 156, Sec. 97. The contention in this case is between a

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creditor of the firm of Clark & Bowers, and the individual creditor of Clark, one of its members, who is seeking to have the partnership property applied to the payment of his debt. Unless the consent of McNeely, the firm creditor, to this application can be shown, this cannot be done. We think the instruction asked should have been given, and because it was refused, the judgment will be reversed and cause remanded, in which the other judges concur.

REVERSED.

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THE STATE, *Appellant*, v. SHANKS.

**Perjury in making Affidavit of non est factum.** An indictment for perjury, charged to have been committed by defendant in making an affidavit denying the execution of a promissory note in a suit wherein he was sued upon the note, is bad, unless it shows that an issue of *non est factum* was raised by answer. An averment that defendant made the execution of the note a material issue, or that it then and there became material to inquire and ascertain whether he did execute it only states a legal conclusion and is insufficient.

*Appeal from New Madrid Circuit Court.*—HON. D. L. HAWKINS, Judge.

J. L. Smith, Attorney-General, for the State, argued that the indictment sufficiently averred the materiality of the facts sworn to, citing *State v. Marshall*, 47 Mo. 378; *State v. Holden*, 48 Mo. 93.

SHERWOOD, C. J.—The indictment charged “that at and before the circuit court of New Madrid county, in the State of Missouri, held at the court house in the town of New Madrid, within and for said county, on the 16th day of March, A. D. 1874, there was then pending in said court an action wherein Humphrey C. Stanley was plaintiff, and Moses Shanks, Benjamin F. Boyce, John T. Scott and Amos R. Phillips, were defendants, and which said action

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was founded upon a promissory note therein, in the petition of said plaintiff alleged to be the promissory note of the said Moses Shanks, Benjamin F. Boyce and John T. Scott, payable to said Amos R. Phillips, and by the said Amos R. Phillips assigned to Humphrey C. Stanley, plaintiff in the said action, and in the said action the said Moses Shanks made it a material issue whether he, said Moses Shanks, signed or executed the said note, and whether the said note was the act of him, the said Moses Shanks; and it then and there became and was material in the said action to inquire and ascertain whether the said Moses Shanks did sign or execute the said note, and whether the same was the act of him, said Moses Shanks; and the said Moses Shanks did, then and there, come in open court in his own proper person, and before John A. Matt, the clerk of the said circuit court, and was then and there in due form and manner, sworn by the said John A. Matt, clerk of the said circuit court, and did make affidavit in writing, and take his corporal oath in open court, before the said John A. Matt, clerk of the said circuit court, touching and concerning the matters in his said affidavit in writing contained, he, the said John A. Matt, clerk of the said circuit court, then and there having sufficient and competent authority to administer an oath to the said Moses Shanks in that behalf, and the said Moses Shanks being then and there so, as above said, sworn before and by the said John A. Matt, clerk of said circuit court, upon his oath aforesaid, falsely, wickedly, corruptly and feloniously did depose, swear, and make affidavit in writing, in substance and to the effect that he, the said Moses Shanks, did not sign or execute the said note so as aforesaid sued on, and that the same was not his act, as by the said affidavit now filed in the said circuit court appears. Whereas, in truth and in fact, the said Moses Shanks did sign and execute the said note so as aforesaid sued on, and the same was the act of him, the said Moses Shanks, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said



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Moses Shanks, in manner and form aforesaid, did feloniously commit willful and corrupt perjury against the peace and dignity of the State." A demurrer to this indictment was successfully interposed; and the State has appealed.

We are of opinion that the court below properly held the indictment insufficient, and for these reasons: Our statute (2 W. S. 1046, § 45) provides, "When any petition

\* \* \* shall be founded upon any instrument in writing, charged to have been executed by the other party, \* \* \* the execution of such instrument shall be adjudged confessed, unless the party charged to have executed the same deny the execution thereof by answer, \* \* \* verified by affidavit." It will thus be readily seen that an affidavit does not raise an issue, and only possesses pertinency and materiality, when serving to verify the allegations of an answer, which raises an issue by denying the execution of the instrument declared on. If no answer had been filed making an issue of the sort just mentioned, an affidavit or testimony in denial of the note's execution, would have been alike impertinent and inadmissible; and if improvidently admitted, could form not the slightest basis for a prosecution like the present. Now, the indictment does not allege that issue was joined between the plaintiff and the defendant touching the execution of the note in suit, thus connecting the affidavit with and using it in verification of the answer, thereby showing the materiality of the matter sworn to. Nor is the defect cured by the general averments that "Shanks made it a material issue," &c., and that "it then and there became material," &c. How did Shanks make it a material issue? Facts should be stated, and not mere legal conclusions. In order to the sufficiency of the indictment charging perjury, the materiality of the affidavit or testimony, must be apparent. (*State v. Keel*, 54 Mo. 182.) This is not the case here, and we affirm the judgment. All concur.

**AFFIRMED.**

OLNEY V. EATON, *et al.*, Appellants.

- 1 **Equity Practice: VENDOR'S LIEN: CROSS-BILL: HARMLESS ERROR OF TRIAL COURT.** In a suit to enforce a vendor's lien, the answer, after denying the alleged indebtedness, pleaded specially that plaintiff agreed to receive lands in Kansas as part payment of the purchase money, tendered a deed, and prayed specific performance. The reply admitted a contract for purchase of the Kansas lands, but charged that this was a separate transaction, having no connection with the first. On this issue the trial court found for the plaintiff; in which finding this court, upon an examination of the evidence, concurred. The trial court, after all the evidence had been heard, dismissed that portion of the answer pleading the contract to pay in lands, treating it as a cross-bill; *Held*, that this was error; that this portion of the answer was pleaded as a part of the main transaction, and as a defense to plaintiff's action, and that the prayer for specific performance of that contract was in substance a prayer that the court would effectuate the main contract of the parties, as understood by defendant, and, as such, that there was no necessity for the dismissal; but, as the judgment would have been the same, whether this portion of the answer were dismissed or not, there was no such error as would justify a reversal of the judgment.
2. **Specific Performance.** The specific performance of a contract for the sale of lands lying in another State, will be decreed in equity, whenever the party is resident within the jurisdiction of the court.

*Appeal from Atchison Circuit Court.*—HON. HENRY S. KELLEY,  
Judge.

Vinton Pike, for appellants.

1. The decree cannot be sustained upon the evidence. Plaintiff in his form of action affirms the contract, seeks its specific performance, and has failed to clearly make it out. The evidence is clear and positive that the contract was as the defendants plead it, and the petition should have been dismissed. (*Paris v. Haley*, 61 Mo. 453.)

2. The court erred in the law of the case. Defendants set up the contract as it was, and relied upon it as their defense. The title to real estate in a foreign jurisdiction was not involved; nor do defendants seek, necessarily,

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the enforcement of a contract respecting it. Yet this court may indirectly act upon real estate situate in a foreign jurisdiction through the instrumentality of its authority over the person of a party. Story's Conflict of Laws, §§ 543, 544, 545; Story's Eq. Jur., §1291; Story's Eq. Pldg., § 489; 2d Kent. Com., 581 (463) and note b; Frye on Sp. Perf., §§ 60 to 63; *Penn v. Lord Baltimore*, 1 Vesey (Sr.) 444, also reported in 3 Lead. Cases in Equity, 664; *Massie v. Watts*, 6 Cranch 148; *Mitchell v. Bunch*, 2 Paige 606; *The Church v. Wily*, 2 Hill Ch. Rep. 584; *Guerant v. Fowler*, 1 Hen. & Mun. 5; *Bailey v. Ryder*, 10 N. Y. 363; *D'Ivernois v. Leavitt*, 23 Barb. 63; *DeKlyn v. Watkins*, 3 Sandf. Ch. 185; *Lord Portarlington v. Soulby*, 3 My. & K. 109; *Dickens v. King*, 3 J. J. Marsh. 591; *Mason v. Chambers*, 4 Id. 408; *McGregor v. McGregor*, 9 Ia. 78, 79, 80; *Sturdevant v. Pike*, 1 Carter (Ind.) 278; *McLean v. Bank*, 3 McLean 622; *Stansberry v. Fringer*, 11 Gill & J. (Md.) 149; *Carrol v. Lee*, 3 Gill & J. 504; *Sutphen v. Fowler*, 9 Paige 280; *Fickett v. Durham*, 109 Mass. 419; *Bank v. Poyntz*, 60 Mo. 532; *Cranstown v. Johnson*, 3 Vesey (Jr.) 170.

*Henry Flanagan and John P. Lewis* for respondent.

1. The clear weight of the testimony shows that the Atchison county sale and the proposed 20 acre trade in Kansas, were to be performed as two independent transactions, and that the \$400 balance on Atchison county lands was due September 1, 1871.

2. This is not a case where a court of equity can assume jurisdiction over lands without the State, in order to settle disputes between the parties. 1 Story, Eq. Juris., § 744 a; *N. Ind. R. R. Co. v. Mich. C. R. R. Co.*, 15 How. (U. S.) 233; 2 Wag. Stat., § 3, p. 1005.

HENRY, J.—This was a suit in the Atchison circuit court to enforce a vendor's lien for \$400, with interest,

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from the first of September, 1871, against a tract of land in said county, purchased of plaintiff by Joseph C. Eaton, which he afterwards conveyed to his co-defendant, Timothy C. Eaton, who, plaintiff alleged, had notice, when he purchased, that said balance of \$400 was then due and unpaid. The consideration for the land was \$4,000, of which plaintiff alleged that \$3,600 was paid in property and cash, and in the assumption by Joseph C. Eaton of \$640, for which the county of Atchison had a lien on the land. Defendants admitted the purchase, but denied that any balance was due from Joseph on the land, alleging that in addition to the sums of money and the lands, and the assumption by defendant of the \$640 due Atchison county, plaintiff was to receive in payment of said \$4,000, twenty acres of land in the State of Kansas, owned by defendants, at \$40 per acre, and that this, with the other payments, was \$400 in excess of the consideration for the tract that Joseph purchased of plaintiff; that he had offered to make plaintiff a deed for said twenty acres of land, which plaintiff refused to receive, and again in court tendered to plaintiff a deed, duly executed and acknowledged, conveying to plaintiff said land, and asked the court to decree a specific performance of the contract. Timothy C. Eaton denied that he knew that said amount of \$400, or any part of the consideration for the land purchased by Joseph C. Eaton of plaintiff, was unpaid. Plaintiff replied, denying all the material facts stated in defendant's answer, admitting that there was a contract of purchase of the twenty acres, but averring that it was not in writing, and that it had no connection with the sale which he made to defendant of the land in Atchison, and pleading the statute of frauds as a defense to that portion of defendant's answer asking a specific performance of that contract. The evidence on the part of plaintiff, conduced to prove the allegations in his petition and replication, while that for the defendants tended to prove the facts stated in their answer. The court found all the issues for plaintiff, and as plaintiff,

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who testified to the facts stated in his petition and replication, was corroborated by three disinterested witnesses, and defendants were themselves the only witnesses who testified to the facts stated in their answer, we cannot say that the finding of the court was against the weight of evidence. Appellants' counsel contends that there was no evidence to warrant the finding that Joseph C. Eaton was indebted to plaintiff in the sum of \$488. The plaintiff's testimony was not as clear as it might have been, as to the amounts paid, and he made some blunders in figures which are urged as evidence that his testimony was false; but, however he may have blundered in arithmetic, the allegations in his petition as to the amount which Joseph Eaton owed him were fully sustained by the defendants as witnesses in their testimony, and as parties, by their answer, if, as the court found, plaintiff did not agree to take in part payment of the \$4,000, the twenty acre tract of land in Kansas. If he did not so agree, then on defendants' own statements, both in their answer and their testimony, \$400 was due the plaintiff from Jos. C. Eaton. The court could believe just as much of the testimony of the defendants as he thought true, and reject the balance; and having found the issue in regard to the twenty acre tract against them, their own testimony showed the balance due to be \$400, with interest from the first day of September, 1871. Interest on that amount to the date of the decree, at six per cent. per annum, was \$88. The dismissal of that portion of the defendant's answer setting up the contract in relation to the twenty acre tract, after the court had heard all the evidence, is no ground for a reversal of its judgment. The defendants are not prejudiced by that action of the court. The answer was not technically a cross-bill, but the facts alleged with respect to the twenty acre tract, were pleaded as a part of the main transaction, and as a defense to plaintiff's action; and the prayer for specific performance of that contract, was, in substance, a prayer that the court would effectuate

1. EQUITY PRACTICE: vendor's lien: cross-bill: harmless error of trial court.



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the main contract of the parties as alleged by defendants. There was, therefore, no necessity for dismissing that portion of the answer. The court erred in treating it as a cross-bill, but as the dismissal occurred after all the evidence had been heard by the court, and, whether dismissed or not, the judgment would have been the same, it was not such an error as would justify a reversal of the judgment. If the sale by plaintiff to defendant, Jos. C. Eaton, and that of the twenty acre tract to plaintiff, had been parts of one transaction, and not several and disconnected, the decree should, and would have been different and favorable to defendants.

The question of jurisdiction discussed in the briefs, would have presented no difficulty. The decrees of courts of equity do, indeed, primarily and properly act *in personam*, and at most, collaterally only *in rem*. Hence, the specific performance of a contract for the sale of lands lying in a foreign country, will be decreed in equity, whenever the party is resident within the jurisdiction of the court. Story's Eq., 2 Vol., § 1291. All concurring, the judgment is affirmed.

AFFIRMED.

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EDWARDS V. HANNIBAL & ST. JOSEPH R. R. Co., *Appellant*.

1. **Forty-third Section of the Railroad Law: Negligence.** In an action under the 43rd section of the railroad law (Wag. Stat., p. 310), there can be no recovery for injuries resulting from the negligent management of a train, (*following Cary v. St. L., K. C. & N. Rwy. Co.*, 60 Mo. 209).
2. **Railroad Fences: STATUTES CONSTRUED.** The 43rd section of the railroad law does not require railroad companies to erect and maintain fences within the limits of incorporated towns.

The 5th section of the damage act (Wag. Stat., p. 520), does not require them to fence anywhere; but simply dispenses with proof of negligence in the first instance when animals are killed where

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there are no fences, but where fences might lawfully have been erected.

*Appeal from Macon Court of Common Pleas.*—HON. WILLIAM A. GUYSELMAN, Judge.

*James Carr and H. B. Leach* for appellant

The statute does not apply to injuries done at points where it would be improper, or is illegal for the railroad company to maintain fences. *Indianapolis R. R. Co. v. Parker*, 29 Ind. 471; *Same v. Kinney*, 8 Ind. 402; *Same v. Oestel*, 20 Ind. 231; *Great Western R. R. Co. v. Morthland*, 30 Ill. 457; *Bennett v. Chicago Ry. Co.*, 19 Wis. 145; *Davis v. Burlington R. R. Co.*, 26 Iowa 549; *Packard v. Ill. Cent. R. R. Co.*, 30 Id. 474; *Smith v. Chicago R. R. Co.*, 34 Id. 509. The defendant was under no legal obligation to inclose its railroad with a fence where it passes through the limits of an incorporated town. *Meyer v. N. M. R. R. Co.*, 35 Mo. 352; *Lloyd v. Pac. R. R. Co.*, 49 Mo. 199; *Iba v. H. & St. Jo. R. R. Co.*, 45 Mo. 473; *Ells v. Pacific R. R. Co.*, 48 Mo. 232; *Wier v. St. Louis R. R. Co.*, 48 Mo. 558; *Wag. Stat.*, p. 310, § 43; *Gerren v. H. & St. Jo. R. R. Co.*, 60 Mo. 405.

*Elijah A. Fletcher* for respondent, cited *Ells v. Pacific R. R. Co.*, 48 Mo. 231.

HOUGH, J.—The petition in the present case contained five counts, in each of which the plaintiff claimed double damages under the 43rd section of the railroad law, for certain hogs killed by defendant's trains in the year 1873, within the corporate limits of the town of New Cambria, in the county of Macon. The cause was tried by the court without the aid of a jury; the finding was for the plaintiff, judgment for double damages was rendered on each of the counts, and defendant has appealed. It was alleged in each count that the hogs were negligently killed at a point within said corporate limits, where there were no

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fences, and where the land was not laid out in lots, streets and alleys, and where the said railroad of defendant passed along and through uninclosed prairie land, and not at a public crossing. The defendant expressly admitted that it had not erected or maintained any fences within the corporate limits of the town of New Cambria, and did not deny the allegation that at the point where the killing took place the land was not laid out in lots, streets and alleys. All other allegations were denied. It appears from the testimony that the land included within the corporate limits of the town of New Cambria was originally prairie land, and there was testimony tending to show negligence in the management of the trains. The killing of the hogs was admitted on the trial. The plaintiff bases his right to recover upon the negligence of the defendant, and its failure to erect and maintain fences within the corporate limits of New Cambria.

It has been expressly decided by this court that in actions under the 43rd section of the railroad law, there can be no recovery for injuries resulting from the negligent management of the train. *Cary v. St. Louis, K. C. & N. Rwy. Co.*, 60 Mo. 209; *Crutchfield v. Same*, 64 Mo. 255. The plaintiff could not recover in this action, therefore, on the ground of negligence.

As to the second point, there is an apparent conflict in the decisions of this court, resulting, rather from inaccurate expressions, than from contradictory rulings. In the case of *Lloyd v. P. R. R. Co.*, 49 Mo. 199, it is broadly stated that "This court has uniformly held that railroad companies are under no obligation to fence their track, where it crosses the plat of a town or city." In support of this statement, Judge Bliss, who delivered the opinion of the court, cited *Meyer v. N. Mo. R. R.*, 35 Mo. 353; *Iba v. H. & St. Jo. R. R.*, 45 Mo. 469, and *Wier v. St. Louis & I. Mt. R. R.*, 48 Mo. 558. The case of *Lloyd v. R. R.*, *supra*, was brought under the 5th section of the damage act, and the circuit court held that the railroad company

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was liable under that section for a failure to fence its track at its passenger and freight depots. The court repudiated that view, and said: "The statute should receive no such unreasonable construction, but should be interpreted in connection with section 43 of the chapter concerning railroads, which obligates railroad companies, among other things, to fence their road where it passes through or along cultivated fields or uninclosed prairie lands. It might extend even further than that, but it cannot receive the construction given it by the court below." In *Ells v. P. R. R.*, 48 Mo., 231, which was also an action under the 5th section of the act concerning damages, the defendant sought to escape liability on the ground that that section was inapplicable to cases where animals were killed within the corporate limits of any town or city. The court said: "But the statute makes no exception in regard to towns, but only an implied one in the crossing of a public highway. \* \* \* Ordinarily, a railroad track cannot run any considerable distance within a town without being crossed by some street, either actually opened or merely established. In that case the fencing cannot be required, for it would shut up a street actually in use, or one that has been laid out and dedicated and may soon be opened. But where the corporation lines embrace portions of the adjacent country not actually laid out as a town, or so laid out that no streets cross the railroad, the reason for the exception does not apply, and the obligation to fence is as imperative as outside the corporation limits." Reference is unquestionably made in the foregoing extract to the "exception" contained in the 5th section of the damage act, and to the "obligation" conceived to be imposed by that act. Now, it should be borne in mind, that while railroad companies are, by the 5th section of the damage act, made liable, without any proof of negligence, for stock killed where there are no fences, except at the crossing of a public highway, that section does not *require* railroad companies to erect fences anywhere on the line of

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their roads. It is inaccurate to say that there is any obligation to fence, imposed by that section. That section simply dispenses with the proof of negligence in the first instance, when the animals are killed where there are no fences, but where fences might lawfully have been erected. The 43rd section of the corporation law, on the contrary positively enjoined, at the time the hogs in question were killed, the erection of fences along or adjoining inclosed or cultivated fields, or uninclosed prairie lands, of the height of at least five feet, with openings and gates or bars therein, and farm crossings of the road, for the use of the proprietors, or owners of the lands adjoining such railroads. It is patent from the phraseology employed in this section that it was intended to apply only to farming lands and the open prairie, and not to lands included within the limits of any incorporated town or city. We do not mean to say that fences can in no case be lawfully erected in towns and cities. In the case supposed in *Ells v. The P. R. R.*, they might lawfully be built. But there is no law requiring them to be built. If the provisions of the 43rd section *supra*, were applicable to all places whatsoever, where fences might lawfully be erected, the provisions of the 5th section of the damage act would be entirely superfluous. This view of the scope and object of the two sections under consideration is sustained by the opinion of this court in the case of *Tiarks v. St. L. & I. Mt. R. R.*, 58 Mo., 45. It was there said that "the 5th section of the damage act was designed to furnish an inducement for the roads to fence their track where it was not deemed absolutely necessary to compel them to do so. By that section, if the road is not fenced, and animals are killed at a place where the law does not require fences to be erected, the law raises the inference of negligence, and the corporation will be liable." The present action having been brought under the 43rd section of the corporation law, there can be no recovery for a failure to erect fences, where, by said section, fences are not required to be erected. The action should have



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been brought under the 5th section of the damage act, as in the case of *Ells v. P. R. R.*, 48 Mo. 232. An action cannot be brought under the 43rd section of the corporation law, and a recovery be had under the 5th section of the damage act. *Cary v. R. R. Co.*, Mo. 209; *Wood v. R. R.*, 58 Mo. 109. It follows, therefore, that the judgment of the circuit court must be reversed and the cause remanded. The other judges concur.

REVERSED.

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COUSINS V. HANNIBAL & ST. JOSEPH R. R. Co., *Appellant*.

1. **Railroad: LIABILITY UNDER THE STATUTE FOR KILLING STOCK.** A railroad company is not liable under the 43 section of the railroad law (Wag. Stat., p. 310), for stock killed upon its track within the limits of an incorporated city, (*following Edwards v. Hann. & St. Jo. R. R. Co.*, ante p. 567).
2. ———: ———: **MASTER AND SERVANT: PLEADING.** A railroad company is not liable under the 5th section of the damage act (Wag. Stat., p. 520), for stock killed by one of its locomotives which was at the time being used by a servant of the company without authority, for his own purposes, and outside of the line of his employment.

This defense need not be specially pleaded, but may be given in evidence under the general issue.

*Appeal from Hannibal Court of Common Pleas.*—HON. JOHN T. REDD, Judge.

The 5th section of the damage act is as follows: When any animal or animals shall be killed or injured by the cars, locomotive or other carriages used on any railroad in this State, the owner of such animal or animals may recover the value thereof in an action against the company or corporation running such railroad, without any proof of negligence, unskillfulness or misconduct on the part of the officers, servants or agents of such company;

but this section shall not apply to any accident occurring on any portion of such road that may be inclosed by a lawful fence or in the crossing of any public highway. Wag. Stat., p. 520.

*Thomas H. Bacon* for respondent.

1. Where one of two parties must lose by the default, miscarriage or negligence of a third person, the loss must fall on the one who furnished the agencies for unlawful damage. It was the duty of appellant to hire men who would do their duty. The appliance which did the damage was a locomotive engine and tender owned and possessed by appellant. The two men who ran the engine were defendant's servants. One of them was at his post of duty, on and in charge of the engine. The other was a superior officer, having a right to be on the engine. Of all appellant's employees, not one else had any right to be on or in charge of said engine. The respondent had no voice in the appointment of these servants, no means of disciplining them by discharge or by deducting from their wages the cost incurred by their negligence. The appellant should have not put such persons in charge of such dangerous machinery. The two servants were on the engine "in the course of the appellant's employment." Whether they were running the engine in the course of such employment is a question arising on their mental purpose. Servants cannot be allowed to hold court in their own hearts and adjudicate their master's liability. *Garretzen v. Duenckel*, 50 Mo., 104; *Harriman v. Stowe*, 57 Mo., 93; *Snyder v. Hannibal*, 60 Mo., 413. In the latter case the parties injured were themselves committing unlawful or negligent acts. Here the animal killed was lawfully on the railroad track. *Gorman v. Pacific*, 26 Mo., 441; *Clark v. Hannibal*, 36 Mo., 202; *Hannibal v. Kenney*, 41 Mo., 271; *Tarwater v. Hannibal*, 42 Mo., 193; *McPheeters v. Hannibal*, 45 Mo., 22. As to master's liability see further, *Gass v. Cob-*

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*lens*, 43 Mo. 377; *Hillsdorf v. St. Louis*, 45 Mo. 94; *Perkins v. Missouri*, 55 Mo. 201; *Doss v. Missouri*, 59 Mo. 27, p. 33.

2. The appellant's proposed declarations of law about its liability for acts of its servants, were aside from the case, because the answer denied that the locomotive was in charge of appellant's servants, when the evidence showed that the locomotive was in charge of its servants, and the defense attempted, was on the ground that the servants had no business to be running the locomotive.

*James Carr* and *H. B. Leach* for appellant.

It was no part of Wilbur's duty to operate or run engines, or to direct their operation or running after they left the round house; and the yard master only had charge of engines, after the regular engineers and firemen had run the engines in off the main track upon one of the yard tracks. The position of neither authorized or required him to run engines on the main track. No officer of the appellant who had any authority to run, or direct or control the running of engines, authorized either the foreman of the round house or the yard master to run the engine which struck the mule in controversy, out on the main track. The former acted as engineer and the latter as fireman, entirely of their free will and accord, without leave or license from the appellant. They were trespassers in doing what they did, just as much as an entire stranger would have been, if he had run the engine out without leave or license. The act was entirely unauthorized, and being so, the respondent is not entitled to recover. *Flower v. Penn. R. R. Co.*, 69 Penn. St. 210; *Welden v. Harlem R. R. Co.*, 5 Bosw. 576; *Mitchell v. Crassweller*, 13 C. B. 237; *Aycrigg v. N. Y. & E. R. R. Co.*, 1 Vroom 460; *Haack v. Fearing*, 35 How. Pr. 459; *Shearm. & Redf. on Neg.*, § 63; *Garretzen v. Duenckel*, 50 Mo. 111; *Howe v. Newmarch*, 12 Allen 49; *Foster v. Essex Bank*, 17 Mass. 479; *Douglass v. Stephens*, 18 Mo. 362.

HOUGH, J.—This was an action under the 5th section of the damage act to recover the value of a mule killed by an engine of the defendant within the corporate limits of the city of Hannibal, in August, 1873. The views of this court in relation to the liability of railroad companies for animals killed by their engines and cars, within the corporate limits of towns and cities, were definitely expressed in the case of *Edwards v. The Han. & St. Jo. R. R.*, and *Elliott v. Same*, decided at the present term, and need not be repeated here.

The principal question in this case is whether, under the circumstances disclosed by the evidence, the defendant is liable for the acts of the servant who managed the engine by which the animal in question was killed. This servant was introduced as a witness, and his testimony, which is uncontradicted, is as follows: "I was in defendant's employ at the time plaintiff's stock was killed; I was superintendent of the round-house; my duty was to see that the engines and tenders were kept in good running order and properly housed and taken care of; I had been acting in this capacity six or seven years; it was no part of my duty to run an engine on the road; was at the time of the injury in the employ of the company as yard-master of the round-house yard; there are a number of tracks in the round-house yard connecting with the main track and leading to the different engine stalls in the round-house. When a train arrives from the west, the engine and tender is run by the regular engineer from the main track on to one of yard tracks and left standing on the yard track, abandoned by the regular engineer and fireman; it was then the duty of the yard-master of the round-house yard to take charge of it and run it into its proper stall in the round-house, where I took charge of it. When an engine was needed for a train going west, it was the duty of the yard-master to run it from its stall to its position on one of the yard tracks, and it was in his charge until the regular engineer

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and fireman took charge of it to run in on one of the main tracks. About 3 or 4 o'clock of the morning of the accident, one of my neighbors, in the employ of the company, was taken sick with an attack of cholera; the doctor lived near the line of the road in the west end of the city, about two and a half miles west from the round-house; a train had come in from the west, and the engine and tender had been run by the engineer on one of the tracks in the round-house yard; knowing that I could go for the doctor quicker by going out on an engine than any other way, I went to the engine standing on the track of the round-house yard, the regular engineer and fireman had left, and the yard-master was in charge of it; he and I got on the engine and run it on the main track, and started for the doctor, I acting as engineer and he as fireman; we ran the tender foremost at a rate of speed of about eight miles an hour; the bell was rung by the yard-master from the time we started until the animals were struck; I did not see the animals until they were struck by the tender; I had no authority from the defendant to take the engine to go for the doctor; we took it without defendant's knowledge or consent; Mr. ———, the yard-master, is now in the State of Mississippi." The court instructed the jury that the foregoing facts would not exempt the defendant from liability.

There can be no controversy about the general rule, that the master is civilly liable for the tortious acts of his servant, when done in the course of his employment, even though the master did not authorize or know of such acts, or may have disapproved or forbidden them. *Garretzen v. Duenckel*, 50 Mo. 107; *Snyder v. Hann. & St. Jo. R. R. Co.*, 60 Mo. 413. The chief difficulty which has arisen in the application of this rule, as was remarked in *Snyder v. Hann. & St. Jo. R. R.*, has been in ascertaining whether the act complained of was committed in the course of the servant's employment. In *Garretzen v. Duenckel*, *supra*, it was said: "In determining whether a particular act is



done in the course of a servant's employment, it is proper first to enquire, whether the servant was at the time engaged in serving his master. If the act was done while the servant was at liberty from his service, and pursuing his own ends exclusively, there can then be no question that the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relations to his master." Two classes of cases have arisen under the rule now being considered, in which the master is not liable for the acts of his servant. The first is where the servant was, at the time the injury was inflicted, engaged in the performance of the service which he had engaged to render, but the act which occasioned the injury did not pertain to the particular duties of that employment. Thus, if an engineer while running a train should shoot an unoffending man upon the road side, the injury would be inflicted while the engineer was engaged in serving his master, but the act causing the injury would have no connection with that service, and could not be considered as done in the course of the servant's employment. The other class is, where the servant was not engaged about the business of the master, at the time he did the injury complained of, but was upon business of his own, or another, totally disconnected from the service which he had engaged to render. The case at bar falls within the latter class. Wilbur's whole duty was to keep the engines in order, and properly housed. He had no authority whatever to take them out for any purpose. He had no more right to go upon the main track with one of them than he would have had if he had been an entire stranger to the defendant, and the defendant cannot be held responsible for the injury resulting from such unauthorized use of its property.

The case of *Mitchell v. Crassweller*, 13 Com. Bench, p. 236, is identical in principle with the case at bar, and somewhat similar in its facts. There it appeared that the defendants were iron-mongers, carrying on business in

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Welbeck street, London, and were possessed of a horse and cart, with which their carman had, on the day mentioned in the declaration, been out to deliver goods. Returning home at a late hour in the evening, the carman drove up to the shop door to get the keys of the stable, for the purpose of putting up the horse and cart. Having got the keys, the carman was about to proceed to the stable which was in an adjoining street, and within five hundred yards of the shop, when the defendant's foreman, who was unwell, asked him to drive him a part of his way home; whereupon the carman went to the house for the purpose of asking permission of one of his employers, but not finding either of them at home, returned to the foreman and observing that "he would chance it," he drove him as far as Euston square. In returning thence to the stable, he accidentally ran over the plaintiffs. Maule, J., said: "The defendant's carman, having finished his business, had nothing further to do but to drive the horse to the stable. At the time of the accident he was not going a roundabout way to the stable, or, as one of the cases expressed it, making a detour. He was not engaged in the business of his employers; but, in violation of his duty, so far from doing what he was employed to do, he did something totally inconsistent with his duty; a thing having no connection whatever with his employer's service. The servant only is liable, and not the employers. All the cases are reconcilable with that. The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it," and the other judges were of the same opinion. It was further held, in the same case, that the defense, that the servant was not at the time of the injury engaged in his master's

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business, could be made under the general issue. And we are of opinion that this defense was admissible under the pleadings in this case. The petition alleged that the engine was, at the time of the accident, in charge of the defendant by its agents and servants. This was denied in the answer. *Pro hac vice* Wilbur was neither the agent nor the servant of the defendants, and the defendant is not liable. The judgment is reversed. The other judges concur.

REVERSED.

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SPOONMORE V. CABLES *et al.*, *Appellants*.

1. **Impeachment of Witness.** When, in a proceeding to contest the validity of a will, one of the attesting witnesses has sworn that he had no recollection of having signed the attestation in the presence or at the request of the testator, his affidavit made before the judge of probate in favor of the will, and containing contrary statements, is admissible in evidence by way of impeachment, after his attention has been properly called to it.
2. **Revocation of Will: INSTRUCTIONS.** When, in such a proceeding, evidence has been given tending to show that after the execution of the will, the testator made other provision for the principal devisee in lieu of that made in the will, the jury should be instructed as to what constitutes a revocation, and it is error to refuse a proper instruction on that subject.
3. **Will: INSTRUCTION.** When, in such a proceeding, the real question is whether the testator was of sound mind at the time of signing, it is error to instruct the jury that the will is void if he was so feeble in mind or body that he was not able to see, and did not see the attesting witnesses sign. Such an instruction is calculated to confuse the jury and to withdraw their attention from the real issue.
4. **Will: DECLARATIONS OF A TESTATOR** made after the execution of his will, tending to show that it was not satisfactory to him, and that he had made, or would make other dispositions of his property, are not admissible in evidence for the purpose of impeaching the will, (*following Gibson v. Gibson*, 24 Mo. 227, and *Cawthorn v. Haynes*, *Ib.* 237.)

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*Appeal from Worth Circuit Court.*—HON. SAMUEL A. RICHARDSON, Judge

Action to set aside the will of Joseph Cables, deceased. Testimony was given on the part of the contestants tending to show that after the testator recovered from the illness during which the will was made, he had said that it was not what he thought it was; that it did not suit him because it made so great a difference between the children; that he was sick when he made it, and did not think he could have been in his right mind; that he was going to take it in (according to some witnesses,) or had taken it in, (according to others,) and would burn it and make a new one; that his son Michael, (the principal beneficiary,) had been a good boy to him and ought to have something; that to make it right he had deeded Michael about one hundred acres, and what was left after he and his wife got through with it, should go to all the children, to be divided among them. On the part of the proponents testimony was given in rebuttal of this. The other facts appear in the opinion.

*Bennett Pike with Lewis & Gibson for appellants.*

1. The affidavit of Cannon should have been admitted in rebuttal and impeachment. His attention had been called to it after he had sworn that he did not sign the will in the presence or at the request of the deceased.

2. Defendant's fourth instruction should have been given to prevent the jury from inferring a revocation of the will by the deceased, from a subsequent conveyance by him of a part of the land devised to Michael. The introduction of evidence of the conveyance of a part of the land devised to Michael, subsequent to the making of the will, could only be intended to show a revocation by acts in *pais*, and the jury should have been instructed that such conveyance did not have the effect of a revocation.

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3. The second instruction in behalf of plaintiff, was calculated to mislead the jury. The evidence on both sides shows that the will was attested in the same room in which the testator was, and immediately after he signed the same, and that there was no change in his condition between the signing by him and the attesting by the witnesses. In that state of the case, the whole issue turned upon the capacity of the deceased to make a will. This instruction left it to the jury to determine,—not his capacity to make the will,—but his capacity to understand whether the same was duly attested. If he was of unsound mind when he signed the will, it was a nullity, and the fact of its attestation could have no possible effect. If of sound mind when he signed it, and no stupor intervened before the same was attested, then the instruction was unsupported by the evidence.

4. The third instruction given for plaintiffs in effect tells the jury that they may consider the declarations of the testator in connection with evidence that tends to show insanity, either as a narrative of facts, or as showing his mental condition at the time of making his will, for neither of which purposes are they at all competent. *Gibson v. Gibson*, 24 Mo. 227; *Jackson v. Kniffen*, 2 John. 31; *Moritz v. Brough*, 16 Serg. & Rawle 405; *Comstock v. Hadlyme*, 8 Conn. 263.

*John Edwards* for respondents.

1. No proper foundation was laid for the admission of the affidavit of Cannon by way of impeachment. He only denied stating in the affidavit that the testator was of sound mind. His denial of other statements in the probate court has reference to evidence given in that court outside of the affidavit.

2. Defendants' fourth instruction was properly refused. The petition contained no allegation that the will had been revoked, and the evidence that the testator, after



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making the supposed will, had conveyed part of the land mentioned in it to Michael, was not offered to show a revocation, but to show that the testator was not aware of its provisions on account of mental incapacity at the time of executing it. Hence the instruction was irrelevant.

3. Plaintiffs' second instruction is correct. Wag. Stat., p. 1364, § 3; 2 Greenl. Evid., (12th Ed.) § 678; 3 Phil. Evid., (5th Am. Ed., Cow. & H's. notes,) 764, \*760; 1 P. Williams, 740; 1 Redfield on Wills, Ch. 6, § 5, p. 248, note 6; 4 Kent Com., 516; *Right v. Price*, 1 Douglas 241; *Norton v. Bazett*, 5 Am. Law Reg. (O. S.) 52.

4. The declarations of deceased are admissible in connection with the other evidence offered, tending to show unsoundness of mind, or undue influence exercised over the testator at the time of making the will, as tending in the same direction. *Cawthorn v. Haynes*, 24 Mo. 236; *Norris v. Sheppard*, 20 Penn. St. 475; *Robinson v. Hutchinson*, 26 Vt. 38; *Beaubien v. Cicotte*, 12 Mich. 459.

NAPTON, J.—This was a proceeding in the circuit court of Worth county by a portion of the heirs of Joseph Cables to contest the validity of a will of said Cables, which had been duly admitted to probate in the probate court of said county, on the ground that the testator was of unsound mind at the date of its execution, and that it was not duly executed, and that it was procured by one of his sons, Michael, through fraud and undue influence. The jury found against the validity of the will under instructions of the court. It is only necessary for this court to consider the propriety of the instructions and the exclusion of some evidence offered.

1. W. H. Cannon was one of the subscribing witnesses to the will. He was examined as a witness by the contestants. He stated that the testator did not ask him to witness the will, but that T. K. Russ, (a justice of the peace who wrote it,) asked him; that the testator did not move his eyes; that they were half closed; that he did

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not hear the will read; that he signed it because Russ asked him to do so; that he did not see the testator sign it; that he had no recollection of the old man's making his mark, or directing T. K. Russ to write his name; that he had no recollection of signing the will at the request of the testator or in his presence. The affidavit of this witness in the probate court was shown to the witness, and he admitted it was his affidavit; that he signed it, but did not remember that he stated to the court that the witnesses signed at the request of the testator. After the close of contestant's evidence, the defendants offered the affidavit of Cannon, which was as follows:

STATE OF MISSOURI, }  
County of Worth. }

In the probate court of Worth county. In the matter of proving the last will and testament of Joseph Cables, late of Worth county, deceased. On the 27th day of February, 1874, before me, W. L. Neal, judge of probate court within and for said county, personally came W. H. Cannon, who, being by me duly sworn, on his oath says, he was present and saw Joseph Cables sign the foregoing instrument, purporting to be his last will and testament, and heard him publish and declare the same to be his last will and testament, and that the deponent and T. K. Russ and Joseph Kenan, the other attending witness, subscribed their names thereto, as witnesses to the same, in the presence and at the request of the testator, and in the presence of each other.

(Signed.)

W. H. CANNON.

Subscribed and sworn to before me, the day and year above written.

(Signed.)

W. L. NEAL,

Judge of Probate.

The court refused to permit the affidavit to be read to the jury, and defendants at the time excepted. The exclusion of this affidavit, we think, was erroneous. It contradicted the testimony of the affiant on the witness-stand

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in several particulars. His attention was called to it, and he admitted signing it. And this affidavit, made in the probate court just after the death of the testator, is certainly evidence to show what he then thought when his memory was probably better than it was at the trial.

2. The court refused to give the 4th instruction asked by the defendants, which was as follows: If the jury believe, from the evidence, that the instrument of writing read in evidence, purporting to be the will of Joseph Cables, deceased, was his will, the same could only be revoked by a subsequent will, in writing, properly executed by him, or by burning, canceling, tearing, or obliterating the same, by the testator, or in his presence, and by his consent and direction. This instruction is a mere copy of the 4th section of our statute, except that so much of the section is omitted as refers to certain modes of revocation, of which there was no evidence in the case. The only objection made to it is that it was an abstraction. The disputed will gave to Michael, the only living son of the testator, his home farm, containing some 230 acres, which, with the improvements, was estimated to be worth \$6,000, whilst his personal estate, estimated at not over \$2,000, was divided equally among all his children, who were married daughters, and his grandchildren by a deceased son. There was no evidence that the testator was ever of unsound mind before the sickness during which his will was executed, or after he recovered from the attack which he survived for nearly four years. He procured the will from the magistrate, who had taken it to his house at his request, when executed, about a year after it was made, and retained it among his deeds and other papers till his death. About three years after the execution of the will he made a deed to his son Michael, for 52 acres of the same land given to him by the will, and this deed, along with certain declarations of his admitted in evidence to show that this conveyance was to be in some way a substitute for the will, was calculated to mislead the

jury, unless the law on the subject of revocation was explained to them. The instruction should have been given.

3. The following instructions were given by the court for the contestants: 2. It is essential to the validity of the will in controversy, that it should be attested in the presence of the testator, Joseph Cables, and with his knowledge or consent, but such presence means a conscious presence, and if the jury believe that at the time said will was made, Joseph Cables did not know or consent that Joseph Kenan and William H. Cannon and T. K. Russ, or any two of them, subscribed their names to such instrument as witnesses to his will, or if they believe that two or all of said witnesses signed said instrument as such witnesses, in the same room where Joseph Cables then was, but at that time he was so feeble in mind and body as not to be able to see, and did not see said witnesses when they so attested said instrument, or did not know what they were doing at the time, and did not afterwards, while said witnesses were in his presence, know or approve such witnessing while his mind was capable of knowing and approving the same, then such instrument is not his valid last will and testament, and the jury will so find. 3. Although the declarations, shown by the evidence to have been made by Joseph Cables, concerning the execution or contents of the will in controversy, cannot be considered by the jury as sufficient to revoke the formal execution of said will, yet the jury may consider such declarations in connection with the evidence, if any, tending to show, that at the time of the execution of said will, Joseph Cables was of unsound mind and incapable of knowing or understanding what disposition of his property had been made by said will. 4. If the jury believe from the evidence in this case, that at the time of the execution of the paper writing in controversy in this case, and purporting to be the last will and testament of Joseph Cables, deceased, the said Cables by reason of the condition of his body or mind, was unable to read said instrument, and if

the jury further believed that he was influenced by any person to make said will, then it is necessary that the jury be satisfied that after said supposed will was written, the same was read over to, or understood by said Joseph Cables, and that he understood its contents; and if the jury believe that said instrument was not so read over or understood, it is not his last will and testament, and the jury will so find. 5. Although unsoundness of mind or undue influence, are not to be presumed, but must be proved, yet direct proof thereof is not absolutely required, but such unsoundness or influence may be found by the jury from all the facts and circumstances shown in evidence, if they are satisfied that such facts and circumstances are sufficient to authorize such finding.

In trying the issue of will or no will the inclination of juries, as a matter of course, will be where the will contains an unequal distribution of the testator's property, to find for the contestants, and especially if any plausible pretext is furnished them from the bench to enable them conscientiously so to find. In the second instruction above quoted the court tells the jury that if the testator was "so feeble in mind or body as not to be able to see, and did not see said witnesses, when they so attested said instrument," then said instrument was not valid. In view of the testimony it is not easy to say what was meant by this instruction. The testator was very low with cholera morbus, as his physician stated, and was propped up on pillows, with his eyes half closed occasionally, so that he could incline his head either towards those present or from them. Does the instruction mean that if, at the time the witnesses signed the will, his head was inclined from them, so that it was impossible for him to see them, the attestation was therefore void? The testator and the witnesses were in the same room, sixteen by eighteen feet, and all the cases, English and American, agree that when the testator was in a position where, by the mere act of volition, he could have witnessed the attestation, it is all that is re-



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quired. If the feebleness of mind or body spoken of in this instruction, as preventing the testator from seeing the attestation, was not such as grew out of any particular position of the testator in the bed, but from a total prostration of bodily and mental powers, then the only effect of the instruction was to complicate and multiply the questions propounded to the jury. The will was void, whether witnessed or not, unless there was some sudden change occurring after it was written and read to the testator, and before it was signed, of which there was no evidence. This instruction concerning the attestation was unnecessary, and calculated to confuse the jury, and withdraw their attention from the real issue before them, which was whether the testator was of sound mind and knew what he was about when he signed the will.

4. The value of the declarations of the testator, made before and after the will, is discussed by Judge Leonard in the two cases of *Gibson v. Gibson* and *Cawthorn v. Haynes*, (24 Mo. 227, 237,) and we have nothing to add to what was there said.

5. In the 4th instruction given by the court for the contestants, the court propounds to the jury the question, "if the jury believe that he was influenced by any person to make said will." Now, although there was a charge of undue influence and fraud contained in the petition, I have been unable to observe in the testimony, from beginning to end, any evidence, even the slightest, that Michael Cables, his youngest son, who at the date of the will was not twenty-one years old, ever even so much as asked his father to make such a will. He states in his own evidence that his father had frequently told him that he intended him to have the home place; and his step-mother, who was a witness for the contestants, states that when the old man was supposed to be near his end, Michael reminded her to speak to his father on this subject, but she states that she did not say a word to him on the subject. That he was very much attached to this son, and doubtless in-

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tended long before his will was executed to leave him his farm, is probable, and it is possible that such a devise was unjust to his daughters, but of that he was the sole judge. The testator lived three years and six months after the date of this will; had it in his possession more than two years; knew its contents, never made any other, but put it away carefully among his papers.

The judgment is reversed, and the cause remanded. The other judges concur.

REVERSED.

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BROWN V. HANNIBAL & ST. JOSEPH R. R. Co., *Appellant*.

1. **Railroads: DUTY OF CONDUCTOR IN EJECTING PASSENGER.** If one goes upon a railroad train intending, in good faith, to become a passenger, the conductor, while he has the undoubted right to put him off if the rule of the company prohibits the carrying of passengers on that train, has no right for that reason to eject him violently, or in such a manner as to imperil his life, as by pushing or ordering him off while the train is in motion, and if he does, the company is responsible in damages for any resulting injury.
2. ———: **DISEASE AS AFFECTING COMPANY'S LIABILITY FOR PERSONAL INJURIES.** The liability of a railroad company for a violent ejection of a passenger from its train, is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure.
3. **Druggist NOT A PRIVILEGED WITNESS.** A drug and prescription clerk may be compelled to testify what medicines he has furnished to a party to a suit, and it is error for the court to allow his claim of privilege when interrogated as to that matter.
4. **Evidence of Character.** When a witness has testified that the character of another witness for truth and veracity is bad, it is discretionary with the trial court to admit or reject further testimony from the same witness to prove his general moral character also to be bad.
5. **Evidence: COMPLAINTS OF PHYSICAL PAIN** made by one suffering from a recent injury, are admissible in evidence on behalf of the sufferer in an action to recover damages for the injury.
6. **Practice:** The court again condemns the conduct of attorneys who

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travel out of the record in addressing the jury, and make statements of fact which there is no evidence tending to prove.

7. **Testimony false in part:** PROVINCE OF THE JURY. If the jury believe that a witness has willfully sworn falsely as to any material fact, they are at liberty to disregard the whole of his evidence, as well those parts of it which may be corroborated by other evidence as those which are uncorroborated.

*Appeal from Linn Court of Common Pleas.*—HON. THOMAS WHITAKER, Judge

At the time of the ejection from defendant's train complained of in this action, a rule in force on defendant's road prohibited the carrying of passengers on extra freight trains.

*James Carr and H. B. Leach* for appellant.

*S. P. Huston* for respondent.

HENRY, J.—This was an action for damages which plaintiff alleged that he sustained from an injury received by him in consequence of being pushed off the platform of defendant's car, by the conductor of the train, while the train was in motion. The evidence shows that in July, 1872, the plaintiff arrived at Chillicothe, after the defendant's passenger train going east had passed that point, and being anxious to reach Brookfield, went to the depot and inquired of a telegraph operator in defendant's employment, when the next train would go east. The operator informed him that there would be no train until three o'clock next morning, when a freight train would pass going east; that without special permission from headquarters, conductors of freight trains were not permitted to receive passengers on such trains, but that if plaintiff would pay for dispatches both ways, he would telegraph Bennett, who was authorized to give permission to persons to travel on freight trains, and procure a permit for him. This was accordingly done, and Bennett gave the required permis-

sion. It was then arranged between plaintiff and the operator, that plaintiff could go to bed at the hotel, and the operator should wake him in time for the train, known as freight train No. 12, which was named in Bennett's telegram as the train he should ride on. The operator failed to wake plaintiff in time for him to take the regular train, No. 12, which moved off as plaintiff approached the depot. There was an extra freight just behind the regular No. 12, and then standing a short distance west of the depot, which was to follow the regular train immediately, and the operator informed plaintiff that he could go on that, as the extra and the regular, by a rule of the road, were regarded as one train, but that he would have to be ready and get on while it was moving by, as it did not stop at the depot. The plaintiff gave the operator some of his baggage, which the operator was to hand him when he got on the train. It came along, moving about six miles an hour; the conductor was standing on the rear platform of the car, or on the step of the platform, and plaintiff, as the train passed, got on the step and was holding to the platform railing. The conductor told him, plaintiff says after he got on, another witness says before, that he could not ride on that train. Plaintiff told him he had a permit. Conductor repeated his remark, and ordered plaintiff to get off—the train still moving at the same rate of speed. Plaintiff states, in his evidence, that the conductor pushed him off of the step on to the depot platform, and that he fell upon his back and was seriously hurt. The conductor and another witness testified that plaintiff got off and was not pushed off by the conductor. There was evidence on the part of plaintiff tending to show that prior to that occurrence he was in reasonable health and condition; on the part of the defendant that he then had syphilis; on the part of the plaintiff that the injury then received on his leg, between the knee and ankle, produced a running sore of an aggravated character, which finally involved the bone, and rendered amputation necessary; on the part of

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the defense that it was a syphilitic sore, and was not caused by any injury received by him in the fall. We have not stated the evidence with a view of passing upon the question of preponderance, but in order that the instructions given and refused, may be properly understood. There was a conflict of evidence on all the material issues of fact upon which the jury have passed, and we cannot disturb the verdict, unless the court made improper rulings in the progress of the trial. The operator had no authority from the company except to transmit and receive telegrams in relation to its business, and none to give passes or permission to travel on trains.

The instructions given for the respondent are the following:

1st. Although the jury may believe that the train upon which plaintiff got, was not, under the rules of the company, allowed to carry passengers, yet, if they believe that plaintiff had a permit from Mr. Bennett to ride on No. 12, and that defendant's agent at Chillicothe directed him to get on this train, informing him that it was part of No. 12, and that his permit entitled him to ride on it, and assisted plaintiff on the train, and that after he got upon the caboose car of the train, the conductor threw or pushed him off while the train was in motion, then they are bound to find for the plaintiff.

2nd. The jury are instructed that the conductor had no right to put plaintiff off the car while the train was in motion, and if he did so, and plaintiff was injured thereby, then the defendant is liable, and the verdict must be for plaintiff.

3rd. Even should the jury believe from the evidence, that plaintiff may have had syphilis or other disease latent in his system, yet if they believe that he was unlawfully and willfully put off of a car on defendant's railroad while the train was in motion, by the servant or agent of defendant, and that he thereby received injuries which directly caused or developed pains in the small of the back and a



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sore upon his right leg, then the defendant is responsible for all the ill effects which naturally and necessarily followed the injuries in the condition of health in which plaintiff was at the time, and it is no defense that the injuries may have been aggravated and rendered more difficult to cure, by reason of plaintiff's state of health, or that by reason of the latent disease, the injuries were rendered more serious to him than they would have been to a person in robust health.

4th. If the jury find for the plaintiff, they may allow: 1st. The expense incurred by plaintiff in attempting to cure himself of his injuries. 2nd. His loss of time occasioned by the injuries. 3rd. His bodily pain and suffering. 4th. The present and prospective condition of the wounded limb, resulting from the injury. And to this sum they may add such amount as they believe the circumstances justify in the way of exemplary damages or smart money, provided they believe that plaintiff was willfully and maliciously pushed or thrown off their train while in motion.

5th. If the jury believe from the evidence that the plaintiff got upon the caboose attached to Tabler's train, and that after he got on he was ordered off the train by the conductor in a threatening manner, and that in attempting to get off while the train was in motion, he, without fault or negligence on his part, was thrown down and injured, then the finding should be for the plaintiff.

6th. If the jury believe from the evidence that any witness has willfully sworn falsely in regard to any material fact, they may entirely disregard the testimony of such witness, unless such testimony as to some part is supported by other witnesses, or by corroborating circumstances.

7th. In making up the verdict, the jury may take into consideration all the facts and circumstances surrounding the case, the plaintiff's condition in life, and his ability to provide for the future wants of his family, and may as-

sess his damages at any sum not exceeding ten thousand dollars.

The instructions given for the appellant were the following:

1st. The jury are instructed that the defendant has the right to prescribe by rule upon what trains passengers may be carried, and that under the rules read in evidence, passengers were not at the time of the plaintiff's alleged injury allowed to be carried upon extra freight trains, without a special permit from the general superintendent or master of transportation.

2nd. Under the permit read in evidence, the plaintiff had no right to ride upon an extra freight train, and upon no train other than freight train No. 12.

3rd. The jury are instructed that in this case the burden of proof rests upon plaintiff, to show each of the following facts: 1st. That he had a permit, from some person authorized to give the same, to ride upon the extra freight train, of which Tabler was conductor. 2nd. That he got on said train and was shoved or pushed therefrom by Tabler. 3rd. That the plaintiff was injured thereby; and unless the plaintiff has established each one of these facts by the preponderance of the evidence, the jury are bound to find for the defendant.

4th. Although the jury may believe from the evidence, that Brown had his leg amputated after the alleged accident at Chillicothe, yet, if the jury believe from the evidence, that said amputation was rendered necessary by a disease which he had, called syphilis, or pox, and not by the accident, then said Brown cannot recover in this action for the loss, time or expense caused by the pox alone.

5th. The jury will decide any fact in issue in favor of that party who has the preponderance of the evidence on his side.

The following, asked by the defendant, the court refused to give:

7th. If the jury believe from the evidence, that the

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plaintiff got upon the platform, or step leading to the platform of the caboose attached to an extra freight train; that the conductor of said train ordered him off; that in obeying said order, he stepped off backwards, tripped himself and fell upon the station platform; that he would not have fallen if he had stepped off in the direction in which the train was running, they will find for the defendant.

The 8th was, substantially, that if plaintiff carelessly attempted to board an extra freight train, not allowed to carry passengers, while it was in motion, and if such carelessness materially contributed to any injury received by him, he could not recover.

The 9th was to the effect that notwithstanding Burke, the operator, told plaintiff he could ride on the extra train, while in motion, yet unless he showed that Burke had authority, from the company, to issue, and did issue to him a permit to ride on the train, he had no right to ride thereon.

The 10th was in substance that the jury should exclude from their consideration the evidence of what was said and done by Burke, with reference to plaintiff's getting on the extra train, if they found from the evidence that he was only the agent of the company to receive and transmit dispatches in regard to the running of trains.

The 11th. If the jury believe from the evidence that said train was running at the rate of five or six miles per hour when plaintiff attempted to get on the caboose attached to it; that the conductor did not know that the operator had told plaintiff that he could ride on the train, then said conductor had a right to prevent the plaintiff from getting on said train, or to order him off after he had got on, and if plaintiff got hurt in obeying said order, and defendant's agent did not contribute to said injury in any other way than as herein stated, they will find for the defendant.

A principal is civilly liable for the wrongful or negligent act of his agent in the course of his employment.

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1. RAILROADS: duty of conductor in ejecting passenger.

This doctrine is well settled in this State, as elsewhere. *Garretzen v. Duenckel*, 50 Mo. 104; *Perkins v. M. K. & T. R. R. Co.*, 55 Mo. 202; *Snyder v. Han. & St. Jo. R. R. Co.*, 60 Mo. 413; *Brown v. Han. & St. Jo. R. R. Co.*, 50 Mo. 461; *Hicks v. Pacific R. R. Co.*, 64 Mo. 430; see also *Norris v. Litchfield*, 35 N. H. 271; *Birge v. Gardiner*, 19 Conn. 507; *Kerwhacker v. C. & C. R. R. Co.*, 3 Ohio N. S. 172. Applying this well established principle to this case, there was no error committed in the instructions given for plaintiff, numbered 1, 2 and 5. Appellant insists that the relation of passenger and carrier did not exist between plaintiff and defendant, and cites *Lillis v. The St. Louis, K. C. & N. R. R. Co.*, 64 Mo. 464. Conceding the plaintiff had no right to ride on the extra freight train, and that the relation of passenger and carrier did not exist, the marked distinction between this and the *Lillis* case is, that in the latter *Lillis* was not only not a passenger, but had no intention to become such. That is, he determined that he would ride upon the train and not pay the customary fare. The conductor, with assistance, put him off, using no more force than was necessary, and the only injury received was from the use of that necessary force to eject him from the car. Here, plaintiff had a permission from the proper authority to ride on freight train No. 12, and was told that the regular No. 12 and the extra immediately in its rear, were but one train under the rules of the company, and he could get on the latter. The evidence of the operator was not to show that plaintiff had a right to ride on the extra, but that plaintiff was acting in good faith in getting on that train. If he had no right to ride on that train, the conductor, after he got on, had the undoubted right to put him off, but certainly not to imperil plaintiff's life by putting him off while the train was running five or six miles an hour. If he had entered the car without any color of right whatever, it would have been the duty of the conductor in ejecting him to use all the precaution necessary to avoid injuring

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him. Instruction No. 7, asked by defendant and refused, declares that if, in obedience to the order of the conductor, the plaintiff stepped off the car backwards and tripped himself and fell upon the station platform, and he would not have fallen if he had stepped off in the direction in which the train was going, the jury should find against him. The train was running six miles an hour, and the speed increasing every moment, and he had no time to measure steps or distances, and is not to be presumed thoroughly acquainted with the laws of motion and momentum, or to be held to mathematical accuracy in getting off of the train in obedience to the conductor's orders, which he was bound to obey. The legal liability of the defendant is the same, whether the plaintiff was pushed off by the conductor while the train was moving or got off in obedience to the order of the conductor, who was not only able, but evidently determined to enforce it. The damages might be less, but the right to recover in either case is unquestionable. The 8th instruction was properly refused because the plaintiff was not injured in getting on, but in getting or being pushed off, after he had got on. The 9th was properly refused, because it was not claimed that plaintiff had a right to ride on the extra in consequence of anything said to him by Burke, the operator. The 10th was properly refused, because the jury had a right to consider what the operator said to plaintiff in regard to his getting on the extra, as affecting the question of plaintiff's good faith in boarding the train. The 11th was properly refused, because the authorities before cited establish the proposition that whether the plaintiff had a right to get on the train or not, or thought that he had or not, yet, after he had entered, the conductor was bound to use proper precaution to avoid injuring him in ejecting plaintiff from the car. *Brown v. M. K. & T. R. R. Co.*, 64 Mo. 536, was a case in which plaintiff refused to pay fare, and insisted upon riding upon a pass fraudulently obtained, and was put off the cars. "No incivility was offered her, or



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any want of courtesy displayed by the conductor, either in handing her off the cars or placing her back;" the conductor had a right to put her off, and did it in a proper manner. There is no analogy between that and this case.

Appellant complains of the 3rd instruction given for plaintiff, but the principle is well established by the author-

ities. "An assault and battery is none the less a wrong, for which the party injured is entitled to damages, because inflicted on a

person enfeebled by disease, or by any other cause. The defendant could not screen himself from the legitimate consequences of his own unlawful acts by proof of the bad habits of the plaintiff." *Littlehale v. Dix*, 11 Cushing 364; *State v. Morphy*, 33 Iowa 270. See also note to this case in 11 American Reports, 125. If the injury on plaintiff's leg from the fall on the platform did not produce the sore which finally made amputation necessary, of course defendant would not be responsible for that; but whether it was a pre-existing syphilitic sore, or one produced by the injury, was a question fairly submitted to the jury. That plaintiff had had syphilis, and that a wound or injury upon his person would be more likely to result seriously than such injuries to persons not so afflicted, is a consideration that cannot avail defendant. Authorities *supra*.

Charles Green, a witness called by defendant, was a drug and prescription clerk, and declined to answer the following question: State what medicines you sold the plaintiff during the years 1871 and 1872, prior to July, 1872? Witness claimed that he was privileged from answering that question, and the court so ruled, and of this appellant complains. There was abundant evidence that plaintiff had syphilis; he admitted in his testimony that he had had that disease, and several physicians examined both on the part of plaintiff and defendant, had testified to having treated him for the disease. It was, at best, but circumstantial and cumulative evidence, and at all events the exclusion of the testimony

2. ———: disease as affecting company's liability for personal injuries.

3. DRUGGIST not a privileged witness.

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could not have prejudiced the defendant, for it is not at all probable that if the testimony had been admitted, the verdict would have been different, for the evidence that plaintiff had syphilis was abundant and conclusive. However, the court erred in allowing the claim of privilege, and should have compelled the witness to testify.

Doc. Kelly, a witness for defendant, testified that he knew the character of plaintiff for truth and veracity, and that it was bad, and defendant then asked

**4. EVIDENCE OF CHARACTER.**      witness if he was acquainted with the general moral character of plaintiff, and on plaintiff's objection, the court refused to let the witness answer the question. Of this defendant complains. If the witness had stated that he did not know the character of plaintiff for truth and veracity, then, under decisions of this court, the question would have been pertinent. But why insist upon an answer to such a question after the witness had stated that plaintiff's character for truth was bad? It certainly will not be insisted that proof of his general bad moral character was admissible for any other purpose, than to affect his credibility as a witness, and as the witness had directly testified that he was not worthy of credit, there was no error in the ruling of the court which materially affected the right of defendant. If his bad moral character had been proved, it would only have been a circumstance to be considered by the jury in determining what credit the plaintiff was entitled to as a witness, and as the same witness by whom it was offered to prove his bad moral character, had already given evidence of his bad character for truth and veracity, there was no necessity or propriety in proving by that witness that his general moral character was not good. The court might have admitted it without error, but its refusal to do so was not such error as would justify a reversal of the judgment on that ground.

Nor did the court err in admitting the evidence of Jo. Brown, of complaints of physical pain, made by plain-

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5. EVIDENCE: tiff on the morning that the accident occurred. 1 Greenleaf Evidence, Sec. 102, and cases cited in note 4, same page.

The remarks of Col. Bell, in his closing address to the jury for plaintiff, were far less objectionable than those of

6. PRACTICE. plaintiff's attorney in *Lloyd v. The H. & St. Jo. R. R. Co.*, 53 Mo., 509, and in that case the court refused to reverse the judgment. The practice of traveling out of the record in an address to a jury, and making statements of facts which there was no evidence tending to prove, has been often condemned, and in a case of gross misconduct in this regard, this court should reverse a judgment obtained by the party whose attorney should so conduct himself, and to avoid such a result, the better and safer practice is, in argument to a jury, to keep within the record and the testimony.

We have considered all the questions presented by the record, because for a palpable error of the court in giving the 6th instruction asked for by the plaintiff, the judgment will be reversed and the cause remanded. The testimony given by the plaintiff was contradicted in several material particulars, and there was evidence tending to prove that his character for truth was bad. The defendant asked and the court gave the following instruction: "If the jury believe from the evidence that any witness has willfully sworn falsely in regard to any material matter on the trial of this cause, then the jury may disregard all the evidence of such witness." For the plaintiff the court gave the same instruction with this qualification: "Unless such as to some part, is supported by other witnesses or by corroborating circumstances." Is the jury not at liberty to disregard the testimony of one who has committed perjury in their presence, as to some fact testified to by him, because as to that or some other fact testified to by him, he is corroborated? If the corroborative evidence establish the fact, they may find the fact on the corroborative evidence, but if the cor-

7. TESTIMONY  
FALSE IN PART:  
province of the  
jury.

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Brown v. Hannibal & St. Joseph R. R. Co.

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roborative evidence is insufficient of itself to prove the fact, but in connection with the evidence of the false witness does prove it, is the jury bound to believe the evidence of the witness, and because corroborated, find the fact as he testifies? This is not the law; the jury may or may not believe him; that is a matter for their determination, and we hold that it is true, as a legal proposition, that if a witness has willfully sworn falsely, as to a material fact, the jury are at liberty to disregard his entire testimony, notwithstanding he may have been corroborated as to that or any other fact to which he testified. *State v. Mix*, 15 Mo. 153; *State v. Dwire*, 25 Mo. 553. The case of the *State v. Cushing*, 29 Mo. 215, is not in conflict with this doctrine. *Blanchard v. Pratt*, 37 Ill. 243, is to the contrary, but was cited by this court in *Paulette v. Brown*, 40 Mo. 60, and expressly disapproved. The authorities in other states, cited by respondent's attorneys, to the effect that although a witness has sworn falsely, yet if corroborated in any manner, the jury may give him such credit as they may think he deserves, we find no fault with; but the instruction complained of here, told the jury, substantially, to give him *credit if he was corroborated*. Respondent's attorneys are mistaken in regard to the instructions given, and in this opinion they are copied from the record. The instruction in *State v. Mix*, 15 Mo. 153, was not as faulty as this. Here, the jury are told, if corroborated at all, they cannot reject any of his evidence. There, they were told, that they might reject his testimony wherein he was not corroborated. It is not a matter of law that they shall or shall not, but that they may reject all, or a portion of the testimony of such witness. The judgment is reversed and the cause remanded. All concur.

REVERSED.

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Kelty v. Valle.

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KELTY V. VALLE, *Appellant*.

**Practice:** POOR PERSON: SECURITY FOR COSTS: IRREGULARITY. An order, allowing the plaintiff to sue as a poor person, is, in effect, revoked by a subsequent order requiring him to give security for costs, and the absence of a formal order of revocation is not such an irregularity as will justify an appellate court in reversing the judgment of dismissal by the trial court for failure to furnish such security.

*Appeal from St. Louis Circuit Court.* The case was tried before HON. JAMES K. KNIGHT, one of the judges.

A. W. Slayback for appellant.

Voullaire & Sternberg with J. C. Morris for respondent.

HENRY, J.—On the 23rd of July, 1872, the plaintiff filed her petition in the circuit court asking to be allowed to sue as a poor person, and, on the same day, the court made an order to that effect. On the 27th of July, 1872, she filed her petition in the cause, and on the 18th of October, her amended petition. Afterwards, on the 23rd of January, 1875, at the December term, 1874, of said court, on a motion filed by defendant, alleging that plaintiff had become a non-resident of the State, the court made an order requiring her to file security for costs, within twenty days from the date of said order. At the February term, 1875, and on the 22nd day of February, the court, on motion, ordered said suit dismissed, because plaintiff had failed to file the security for costs required by its order made at the December term. At the April term, 1875, plaintiff filed her motion to set aside said order of dismissal, and reinstate the case, which the court overruled, and plaintiff appealed to the general term, which reversed the judgment, and defendant has appealed to this court. The order permitting the plaintiff to sue as a poor person was not irrevocable, and that requiring her to give security for



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Kelty v. Valle.

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costs was, in effect, a revocation of the order allowing her to sue as a poor person. The Statute, Sec. 2, Wag., 342, expressly provides that "If, at any time after the commencement of any suit by a resident of the State, he shall become non-resident, &c., the court shall, on motion of the defendant, or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit, and if such plaintiff shall fail on or before the day in such rule named, to file the undertaking of a responsible person, being a resident of the State, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, the court may, on motion, dismiss the suit, unless such undertaking shall be filed before the motion is determined." Here there was no undertaking of any one to be responsible for the costs filed before the motion was determined; nor did plaintiff, when she came and asked the court to set aside the order of dismissal, offer to file any such obligation. It was competent for the court to rule her to give security for costs, and to dismiss the suit, if she failed to comply with that order; and the only ground she relies upon here, is, that there was no formal order setting aside that by which she was allowed to sue as a poor person. This was not such an irregularity as to justify the interference of the appellate courts. There was no abuse of the discretion confided by the law to the circuit court. The authorities cited by respondent fully sustain the position that, if this were such an irregularity as materially affected her interests, her motion to set aside the order of dismissal was not made out of time, but no authority has been cited which would countenance such an interference by this court with the exercise of its discretion by the circuit court, as is here asked. The ground relied upon to sustain the action of the general term is a mere technicality, and the order requiring the security for costs was so complete a revocation in substance of the order allowing the plaintiff to sue as a poor person, that it would

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Quinlan v. Keiser.

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be a perversion of the doctrine of the authorities cited, to hold that the absence of a formal revoking order was such an irregularity as to constitute an error for which the judgment of the circuit court dismissing the cause should be reversed. All concurring, the judgment of the general term is reversed.

REVERSED.

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QUINLAN *et al.* v. KEISER *et al.*, Appellants.

**Equity Jurisdiction to open Settlements:** PLEADING. An action to open a settlement of joint account transactions cannot be maintained, if it appears that the plaintiff was aware, when he made the settlement, of the facts on which he bases his claim to relief; and this is true although that defense is not set up in the answer.

*Appeal from St. Louis Court of Appeals.*

Plaintiffs and defendants engaged in the purchase and sale of whisky on joint account. Defendants did the buying. A settlement was made and the profits were divided on the basis of eighty cents per gallon as the cost of the whisky. Its actual cost to defendants was but seventy cents per gallon. This suit was brought to open the settlement and have the account re-stated. The petition charged that defendants were guilty of fraud, misrepresentation, and concealment as to the cost of the whisky. The answer denied these charges, and averred that plaintiffs, when they made the settlement, knew that it only cost seventy cents.

*Martin & Lackland* for appellants.

1. Respondents have no equity, having finally settled the account and got their money upon it, when, at the date of the settlement, they had knowledge of the only two matters of which they complain in this case. It has no analogy to the Pomeroy & Benton case. It is a case of

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Quinlan v. Kelsner.

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settlement after actual knowledge of the matters complained of; not a reasonable opportunity to acquire such knowledge. The trial court having settled this issue of fact for appellants, this court will not disturb the finding. *Sharpe v. McPike*, 62 Mo. 300.

*T. Z. Blakeman* for respondents.

1. Appellants had a positive duty to perform towards the respondents, to-wit: The duty of making a full disclosure to the respondents of all facts within their knowledge touching the original cost of the liquors. Such duty was not discharged at any of the various accountings, including the last, and, not having been discharged, the last accounting cannot be held final and conclusive, or operate as an estoppel upon the respondents. *Pomeroy v. Benton*, 57 Mo. 531; Story. Eq. Jur., (Redfield's Ed.) §§ 523, 527, 528.

2. Respondents had the full right to rely and act upon the statements made to them by the appellants concerning the cost of the liquors, and to disregard contrary statements made to them by third parties; and if they did so rely and act upon such statements at the last accounting, and did disregard the statements of third parties, appellants cannot complain of respondents' conduct, or urge it against them as an estoppel. *Pomeroy v. Benton*, 57 Mo. 531.

3. Respondents insist that the last accounting does not bar respondent's right to recover their portion of the original overcharge on the liquors, unless respondents actually intended at the time to forego their claims thereto, and both knew and believed that such overcharge existed. *Grumley v. Webb*, 44 Mo. 445.

SHERWOOD, C. J.—The object, sought by this proceeding, was to have opened the settlement of an account on the ground of fraud, and to have a new account restated, &c. The referee found that defendants had been guilty of undue concealment in dealing with plaintiffs in regard to

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Quinlan v. Keiser.

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the whisky purchased on joint account, and that the relations of trust and confidence existing between the parties, demanded the fullest disclosure; but the referee also found that plaintiffs were apprised of the fact that defendants had acted towards them in a manner not consonant to equity and good conscience; and this knowledge was acquired anterior to the settlement now sought to be opened. Upon this state of facts, his opinion was that plaintiffs had no standing in a court of equity. The circuit court adopted this view, and dismissed the petition. This judgment was affirmed at general term, but on appeal, the Court of Appeals, on the ground that the report of the referee could not be applied to the pleadings, reversed the judgment and remanded the cause. In other respects than the one just noted, the opinion of the Court of Appeals sustains the report of the referee. It seems to us that the view taken by the referee is the correct one; that it is quite immaterial how inartistically drawn is the answer of defendants, since it is apparent that let the answer be what it will, plaintiffs cannot be successful. We have been cited by counsel for plaintiffs to the case of *Pomeroy v. Benton*, (57 Mo. 531,) but, whatever parallelism there may be between the two cases in other respects, it is certain that, in the particular referred to, there exists none whatever; for in that case Pomeroy had no reason to suspect the fairness of the balance sheet presented; here on the plaintiffs' own showing, they had every reason to believe that they had been wrongly treated, and yet made not the slightest objection to the settlement now asked to be opened. In instances such as these, courts of equity invariably apply the maxim: "He who did not speak when he should have spoken, shall not be heard, now that he should be silent." Holding then, that the inexcusable laches of plaintiffs has barred them of whatever right to equitable relief they may once have possessed, we reverse the judgment of the Court of Appeals, and affirm that of the circuit court.

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Murray v. Purdy.

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All concur, except HOUGH and HENRY, J., not sitting.

REVERSED.

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MURRAY V. PURDY *et al.*, Appellants.

**Administrator's Sale:** EFFECT OF APPROVAL OUT OF TIME. An order of a county or probate court approving a sale of real estate by an administrator, when made at a term different from that prescribed by law, is not void, but voidable only. (*Speck v. Wohlien*, 22 Mo. 310; *Strouse v. Drennan*, 41 Mo. 289; *Mitchell v. Bliss*, 47 Mo. 354, criticised).

*Appeal from Audrain Circuit Court.*—HON. GILCHRIST PORTER, Judge.

A petition was filed, in the county court of Audrain county, asking for an order approving a sale of real estate for the payment of debts made by an administrator, and directing his successor, one of the appellants, to make a deed to the purchaser, the respondent, and setting forth the facts, stated in the opinion of the court. The proceedings were certified to the circuit court, on account of the interest of the judge of the probate court in the matter in controversy, and, upon the hearing of the case, the circuit court made an order approving the sale, and directing the acting administrator to make to the respondent a deed. From this order the case was brought to this court by appeal.

*Craddock & Musick* for appellants.

1. The statute, Chap. 122, Sec. 36, Gen. Stat. 1865, provides when a purchaser may bring in the successor of the administrator making the sale, and have him to make a deed by order of court. It is when the sale has been



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made, and the purchase money has been paid, and the administrator has removed from the State, resigned or had his letters revoked without or before making a deed. But in the case at bar, the officer who made the sale did make a deed, which the parties in interest now think defective, because the report of sale was not made and approved at the next term of the court, but at an adjourned term of the present court. *Castleman v. Relfe*, 50 Mo. 583; *State to the use of Perry v. Towl*, 48 Mo. 148.

2. The case at bar differs from *McVey v. McVey*, 51 Mo. 406, in this, that it is not the officer who made the sale, nor yet his successor, who prays permission to refile the report of sale and have it approved, but the purchaser who attempts to bring in the successor and cause him to make a deed after the court shall have approved the report filed by his predecessor. In the *McVey* case, the court was only asked to approve the report; in this, it is also asked that the present administrator be required to make a deed; in that case the court did what it was authorized by statute to do, and the only question was, as to whether it was out of time in doing it; in this, the court has attempted to do what it is nowhere authorized by statute to do, and which, therefore, can only be done in the exercise of chancery jurisdiction, which the probate court does not possess. *Speck v. Wohlien*, 22 Mo. 310; *Coil v. Pitman*, 46 Mo. 51.

3. Even courts of equity will not aid the defective execution of statutory powers. *Wilcox v. Emerson*, 10 R. L., 270, (14 Am. Rep., 683.); *Ware v. Johnson*, 55 Mo. 500; *Schwickerath v. Cooksey*, 53 Mo. 75; *Hubble v. Vaughan*, 42 Mo. 138; *Valle v. Fleming*, 19 Mo. 454; *Moreau v. Detchemendy*, 18 Mo. 522; *Allen v. Moss*, 27 Mo. 354; *Moreau v. Branham*, 27 Mo. 351; *Mitchell v. Bliss*, 47 Mo. 353.

*G. B. McFarlane* and *S. M. Edwards* for respondent.

1. The purchaser, and no one else, should petition.

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The proceeding is not an attempt on the part of the probate court to exercise chancery powers; nor is it an attempt to aid the defective execution of a power, but is an execution of a power expressly given by the statute. Wag. Stat., p. 98, Sec. 36.

2. The order of the court approving the sale, at the special term, held in July, 1865, and the deed of Duncan thereunder, were wholly unauthorized and void, the record showing no appearance of those interested. *Speck v. Wohlien*, 22 Mo. 310; *Strouse v. Drennan*, 41 Mo. 289; *Mitchell v. Bliss*, 47 Mo. 353. If Duncan were still the administrator, another report and deed could be made by him. *Mc Vey v. Mc Vey*, 51 Mo. 406. His successor, therefore, is the party to make the deed. No authority is given anyone else.

NAPTON, J.—This suit was brought upon the theory adopted by this court in *Mc Vey v. Mc Vey*, 51 Mo. 406, and the only observable difference between the two cases is, that the plaintiff in this case was the purchaser, and the sale was by an administrator and the defendant is the administrator, or rather the successor of the administrator who made the original sale, and in the *Mc Vey* case, the sale was by a guardian, and the report of the sale was made at an adjourned term of the court—the sale having been ordered about a month before at the same term of the court. In the present case, the administrator made application to sell the real estate, accompanied with a full statement of the condition of the estate, and the notice required by the statute was published, and the order of sale was made. The appraisement by three disinterested householders was made, the notice of the sale four weeks before was duly published, the sale was a public one, and the land was sold for its appraised value, or a little more. This was at the February term of the county court, 1865. The next term of this court was by law fixed for the first Monday in May. On the 17th of March, 1865, the ordi-

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nance "providing for the vacating certain civil offices in the State, filling the same anew, and protecting the citizens from injury and harrassment," was adopted by the convention, which vacated the offices of the judges of the county court on the 1st day of May. The consequence was, that no court was held on the 1st Monday in May, but about the middle of that month the judges appointed by the Governor, held a special term of the court, during which, in July, the administrator made his report of sale, which was approved, and he executed on the 24th of July, a deed to the purchaser, reciting all the above facts.

The case of *Speck v. Wohlien*, 22 Mo. 310, was a bill in equity for the specific performance of an administrator's sale of real estate by a deed, and the court refused to compel the administrator to convey. In that case there was an approval of the sale, but not made at the term required by law, and no deed had been made. Judge Scott observed, referring to the previous decision in *Fry v. Kimball*, that "it was one thing to sustain an ancient deed, on which the rights of property repose against objections which may be urged for its overthrow; and another thing to make a deed or pass a title, when the same objections are urged, as a reason why the deed should not be executed, or the title pass, in the first instance. Deeds are sustained every day against objections, which, if they had been urged as a reason why the deed should not have been executed, would have prevailed." Again, "Had the approval been made at the term required by law, there might have been some weight in the proposition, that it could not be questioned collaterally. The party affected could then have taken his appeal. But the objection here, is, that the approval was made at a time when he was not in court and not required to be there; and as the appeal must be taken at the term at which the approval was made, the party not having notice and not being present could not take his appeal."

\* \* "In suggesting these considerations respecting the approval, as it now stands before us for our sanction,

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prospectively we do not wish to be understood as expressing our opinion as to such approval, already acted upon and consummated in a deed. As before observed the distinction between the cases is glaring." In *Valle et al, v. Fleming et al*, 19 Mo. 454, there was no publication of notice as required by the statute, and no approval by the court of the sale. In regard to this last objection, Judge Scott observes: "So far as the court was concerned, the approval would seem to be the crowning act of the sale. It is not maintained that it should be *in totidem verbis*, but the sanction of the court to the proceedings should, in some way, appear; otherwise, the sole condition on which the law imparts any validity to them is not complied with. An order directing the administrator to make to the purchaser a deed, would be an implied sanction of his proceedings." In *Strouse v. Drennan*, 41 Mo. 294, there was no appraisement, the report of sale was made on the same day the sale occurred, and the deed made by the guardian contained none of the statutory recitals, and conveyed no title. In regard to the necessity of an appraisement, Judge Wagner observed: "This is an absolute requirement of the law, and it should be obeyed even if the reason of it was not plainly perceived. But it was enacted for good and substantial reasons: It furnishes evidence to enlighten the judgment of the court in the approval or rejection of the sale. \* \* The report was confirmed at the term at which the sale was made; in fact, on the very day of the sale. The court had no authority to proceed to act in the premises at that term, no more than a court would be authorized to render final judgment at the return term of a writ, when the law declares that it could only be rendered at the second term." In *Mitchell v. Bliss*, 47 Mo. 354, the sale was by an administrator, and was reported and approved at the same term of the court. The court held the sale void, Judge Bliss observing that "the sale was irregular; the express requirement of the statute was disregarded—a requirement that has always been held by

us to be a material one, and essential to the validity of the sale." These are the leading cases relied on to establish the doctrine that in administration sales and guardian sales under our statutes, a report of the sale, not made at the term the statute requires, is an irregularity which renders the judgment of approval, and the deed following it absolutely void.

This rule undoubtedly is an exception to the general doctrine of this and other courts in regard to mere irregularities in the time of entering judgments. In *Doan v. Holly*, (27 Mo. 256), it was held that when a judgment is irregularly rendered against the provision of a statute, or the rules of court, the party against whom it is rendered may have it set aside. In *Branstetter v. Rives*, (34 Mo. 318), a judgment by default was taken before the time allowed by law to answer. The court held it an irregularity, which could be corrected at any time within three years, in accordance with the 26th Sec. of Art. 13 of the practice act.

Judge Bay observes that "the judgment is not a void judgment, for the court had undoubted jurisdiction of the parties as well as the subject matter of the suit; but it is an irregular judgment, entered in advance of the time provided by law." In *Tidd's Practice*, 512, (referred to in that case), the following definition is given of irregularities in judicial proceedings: "An irregularity may be defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time, or improper manner. A judgment by default is irregular when the defendant, in an action not bailable, has not been served with a copy of process, or there has been no declaration regularly delivered or filed, and notice thereof given to defendant; or when it is required before defendant's appearance, or without entering a rule to plead, or demanding a plea when necessary before the time for pleading has



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expired, or after a plea has been regularly delivered or filed."

In *Lawther v. Agee*, (34 Mo. 373), there was an interlocutory judgment taken and a final judgment at the same term, in a suit that was not founded on a note for the direct payment of money. The court said: "This was an irregularity which entitles the defendant to have the judgment set aside, by motion in the court below. It is not a void judgment, but an irregular judgment, and the remedy of the defendants was to move to set it aside." The same doctrine is announced by this court in *Watson v. Walsh*, (10 Mo. 454), and in *Hawley v. Holmes*, (1 Mo. 84), and *Harkness, Admr. v. Dysart*, (36 Mo. 47.) It appears that the position taken in *Strouse v. Drennan*, and *Mitchell v. Bliss*, is based upon a very guarded and qualified observation of Judge Scott, in a case where no deed had been made, and where the court was asked to compel the administrator to make a deed; a very different case, as was observed in the same opinion, from a report consummated by a deed. The observation of Judge Scott was, as we have above quoted it, that the heirs were not in court at a term when by law it was not required to be filed, and therefore could take no appeal. But our statute, which allows judgments in any court of record (and county courts are courts of record) to be set aside for irregularity at any time within three years after the term at which the judgment is rendered, destroys the weight of the argument, if the judgment of approval at an improper term is a mere irregularity. That it was so, the definition of Tidd and the cases cited from our reports clearly establish, and indeed it is so stated in the opinion in *Mitchell v. Bliss*, though declared to be a fatal irregularity.

It is by no means clear, in the present case, that the administrator did not substantially, and literally comply with the statute. The 20th section of the 4th article concerning courts, required an advertisement of a special term to be set up in five public places in the county, at

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least five days before the commencement of such term; and the nature of the business to be transacted at a special term, is not limited or in any wise restricted. The parties interested could hardly fail to know, under the peculiar circumstances, the causes of the lapse of the regular term, and the substitution of the special term in its place. But, however this may be, we do not base our opinion on the particular facts in this case, but upon the ground that such approvals, out of time, are not void judgments, but voidable. I do not favor the disturbance of any opinion of this court which tends to the security of vested interests. The facts disclosed in the case of *Mc Vey v. Mc Vey*, (51 Mo. 406), and *Perry v. Towl*, (48 Mo. 148), and *Castleman v. Relfe*, (50 Mo. 586), and the present case, however, do not indicate that an adherence to the opinions referred to on the point we have briefly considered, would have such a conservative effect upon titles as to induce an acquiescence in them, contrary to our settled convictions. On the contrary, their tendency has been to encourage heirs to estates thus sold for a fair price to lie by until circumstances have materially enhanced their value, and then avail themselves of the irregularity, to deprive *bona fide* purchasers of lands for which they have paid full value. The judgment in this case was for the right party, and will therefore be affirmed. All the judges concur.

AFFIRMED.

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SIMS *et al.*, Plaintiffs in Error v. GRAY.

1. **Deed:** COPY AS EVIDENCE. A certified copy of an administrator's deed is not admissible in evidence, when the original is in the possession of the party offering the copy, although it is not offered as evidence of title, but only for the purpose of proving the sale by the administrator and the purchase by himself.
2. **Ejectment:** VOID ADMINISTRATOR'S DEED: EQUITY: PLEADING. When a defendant in ejectment, holding under a deed made by the

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administrator of plaintiff's ancestor, admits that the deed does not convey the legal title, he cannot bar the plaintiff's recovery by showing that he paid the purchase money, that the administrator applied it in payment of the debts of the estate, and that he has since paid the taxes and made lasting improvements on the land; but these facts entitle him to have an account taken, and to have the sum found to be due him declared a lien upon the land.

An answer setting up this defense and not praying such relief, is defective.

3. **An Administrator's Deed** is not void by reason of the fact that the sale was reported to and approved by the court at the same term at which it was made, (*following Johnson v. Beazley, 65 Mo. 250*).

*Error to Butler Circuit Court.*—HON. R. P. OWEN, Judge.

The answer was framed on the theory that the administrator's deed was void, because the sale was reported and approved by the probate court at the same term at which it was made, according to the former rulings of this court.

*Crumb & Brown* for plaintiffs in error, urged that there was no prayer for any relief whatever, while a prayer for some relief, general or special, must be stated, and is an essential part of the answer, citing *Rutherford v. Williams, 42 Mo. 23*; *Peyton v. Rose, 41 Mo. 262*; *Milttenberger v. Morrison, 39 Mo. 78*.

*S. M. Chapman* for defendants in error, insisted that the court had power under Sec. 12, p. 1054, Wag. Stat., to grant defendant any relief consistent with the case made. *Nothercraft v. Martin, 28 Mo. 469*; *Easley v. Prewitt, 37 Mo. 361*. Beside Gray is not a plaintiff seeking affirmative relief. He is seeking to defeat plaintiff's action by establishing certain facts.

HOUGH, J.—This was an action of ejectment brought by the plaintiffs as heirs at law of William Sims, for the recovery of certain lands of which he died seized. The defendants in their answer admitted the plaintiffs' legal title, but averred that said lands were, in October, 1867, sold at administrator's sale, for the payment of the debts of said

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William Sims; that the defendant, Gray, became the purchaser at said sale, paid the purchase money, which was used to pay the debts of the estate, received a deed from the administrator, went into possession thereunder, and has since occupied and cultivated the land, having in the meantime paid the taxes and made lasting and valuable improvements thereon. The answer further averred that the plaintiffs had not returned, nor offered to return, to the defendant, the purchase money paid by him, nor to compensate him for the improvements he had made upon the land. It appears from the record that the report of sale was made by the administrator and approved by the court, at the same term at which the sale was made.

A certified copy of the administrator's deed was offered in evidence by the defendant, not with a view of showing title in himself, but for the purpose of proving the sale and his purchase. The copy offered was properly excluded by the court, as it appeared that the original was in existence, and under the control of the defendant.

The remaining facts set up in the answer, were fully established by the testimony. These facts were pleaded in bar of a recovery, and not simply as conferring an equity upon the defendant. The case was tried by the court without the aid of a jury, and a general judgment was rendered for the defendant. In pleading such an equity as is here set up, to an action of ejectment in which the plaintiff's legal title is confessed, the answer should contain a prayer that an account be taken, and that the sum found to be due the defendant should be declared to be a lien upon the land; and the judgment of the court should be that the plaintiff should have possession upon paying the defendant the sum so found to be due. This was not done in the present case, and in this particular the answer of the defendant was defective. The facts stated constituted an equity in the defendant, but did not amount to an equitable estoppel which would bar a recovery. *Evans v.*

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*Snyder*, 64 Mo. 518; *Jones v. Manly*, 58 Mo. 563. Cases might arise in which the heirs would be precluded from any recovery. On the case made, the judgment of the circuit court was erroneous.

It may be proper to remark that if the defendant had introduced the administrator's deed, the judgment might be upheld, notwithstanding the fact that the sale was reported and approved at the same term at which it was made. When the petition for the sale of the real estate was filed and publication was made, notifying all persons interested in the estate that, on a day named, an order for the sale thereof would be made, unless cause to the contrary should be shown, the heirs were in court; and no other or further notice was required, by law, to be given to them of any subsequent proceedings in the cause. The court was a court of record, having complete jurisdiction of the subject matter of the proceeding, and while such jurisdiction must be exercised according to law, yet if the court exceeds its powers under the law, and disregards the statutory requirements established for its guidance, its acts may be irregular or erroneous, but they will not be void. *Johnson v. Beazley*, 65 Mo. 250. A judgment rendered after notice, but sooner than it should have been rendered according to the rules of law, or the practice of the court, is simply an irregular judgment, and may be set aside on motion, in any court of record, at a subsequent term. 2 Wag. Stat., 1,062, § 26; *Branstetter v. Rives*, 34 Mo. 318; *Lawther v. Agee*, 34 Mo. 372; *Harkness v. Austin*, 36 Mo. 47. This remedy seems to have been overlooked in the cases of the State to the use of *Perry v. Towl*, 48 Mo. 148, and *Castleman v. Relfe*, 50 Mo. 583, where it was clearly applicable, and also in the cases of *Strouse v. Drennan*, 41 Mo. 289, and *Mitchell v. Bliss*, 47 Mo. 353. The judgment of the circuit court will be reversed and the cause remanded. All concur.

REVERSED.



*WEIL et al., Plaintiffs in Error v. SIMMONS et al.*

1. **A Judgment in PERSONAM** against a married woman, is a nullity ; and this is true though she is sued as member of a mercantile firm.
2. **Practice: NEW PARTIES.** An objection to the action of the trial court admitting a new party to a suit comes too late, if made for the first time when the case has reached the Supreme Court.
3. **A Judgment against a Married Woman:** UNDER THE STATUTE OF AMENDMENTS AND JEOPAILS (Wag. Stat., pp. 1034, 1036, 1037, §§ 6, 19, 20), a judgment at law against several defendants, one of whom appears by the record to be a married woman, may, in furtherance of justice, be amended by the court which rendered it, at a subsequent term, by striking out the name of the married woman and permitting the judgment to stand as against the others.

PER HOUGH, J., DISSENTING.

4. Such a judgment is a mistake of law, and is erroneous, and can only be corrected on appeal or by writ of error ; it is not an irregular judgment within the meaning of the statute authorizing judgments to be set aside by the court in which they were rendered for irregularity.

*Error to Phelps Circuit Court.*—HON. ELIJAH PERRY, Judge.

*W. G. Pomeroy with Lay & Belch for plaintiffs in error*

*Henry Flanagan for defendants in error.*

SHERWOOD, C. J.—The record discloses that defendants Sabina Simmons and Daniel Deegan, carried on as partners, under the style of Simmons & Deegan, a mercantile business at Rolla, Mo. Being sued by plaintiffs on an account, contracted as such firm, and the husband being joined as a necessary party defendant, each of the defendants, by written acknowledgement, acknowledged service of process, waived necessity of service by an officer, waived all error, and consented to the rendition of judgment. Judgment *in personam* was accordingly rendered against all of the defendants, a small per cent. of which was paid. Subsequently, they instituted proceedings to set aside the

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judgment and stay execution. The latter portion of the prayer was granted, and a temporary stay ordered in vacation. On convening of court, Thos. Smith, trustee in bankruptcy of the firm of Simmons & Deegan, appeared, was made without objection, a party defendant, and filed a motion to set aside the judgment. The motion was successful, and thereupon the temporary order for stay of execution was made perpetual, and plaintiffs come here by writ of error.

1st. Judgment against married woman *in personam*, is a nullity. (*Caldwell v. Stephens*, 57 Mo. 589; *Wernecke v.*

1. A JUDGMENT in *personam*. *Wood*, 58 Mo. 352; *Gage v. Gates*, 62 Mo. 412; *Lincoln v. Rowe*, 64 Mo. 138); and the

attitude of the case is by no means altered, because of her being declared against as a member of a mercantile firm. Considered alone with respect to the question of irregularity, the action of the court below, in granting the motion, was clearly correct; and were this the only point for consideration, we should, without hesitancy, affirm the judgment. We shall advert to this matter hereafter.

2nd. If the judgment, on account of the obvious irregularity, was properly set aside, it is quite evident that the execution fell with it; so that the perpetual staying of a *fi. fa.* issued on a vacated judgment, could work the plaintiffs no hurt; and therefore could not form a subject for revision here.

3rd. As to Smith, who it seems, had been appointed trustee in bankruptcy of the firm composed of Mrs. Simmons & Deegan, and who, as such, filed the successful motion aforesaid, it is only necessary to observe that no objection having been made to his coming in as a party, the time has passed for making it now.

4th. Nor is the aspect of the case at all changed as to the proper results attendant on such motion, by reason of the fact that prior to its filing, a temporary injunction as above stated had been applied for and granted in vacation

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at the instance of the judgment defendants. The motion of the trustee in bankruptcy, was entirely distinct from, and independent of any precedent action of the judgment defendants themselves, and therefore not to be affected by anything which they had done, or attempted to do.

5th. We come now to the matter whereto we heretofore promised to advert. It has been suggested, that conceding in one point of view, the correctness of the ruling, which caused the issuance of the present writ of error; yet, that, under our statute of jeofails, and the case of *Cruchon v. Brown*, (57 Mo. 38,) this court ought to strike out the name of Mrs. Simmons, and thus amend the judgment in the — obnoxious particular complained of. We regard the suggestion as possessed of much force, and for these reasons: Our statute of jeofails (§ 6, p. 1,034, 2 W. S.,) provides that the court in furtherance of justice may add or strike out the name of a party. And although that section is in strictness applicable to trial courts, yet sections 19 and 20 of the same article breathe the same spirit, and are equally broad in the scope of the amendatory powers, which they confer on courts possessed of appellate jurisdiction. Section 19 is as broad as eternity, and enumerates and cures every conceivable blunder that an ignorant court, its officers, the parties or their attorneys are likely to commit, provided it be one “*by which neither party shall have been prejudiced*,” and section 20 gives to this court the healing power to supply and amend “the omissions, imperfections, defects and variances in the preceding section enumerated, and *all others of a like nature*, not being against the right and justice of the matter in suit, and not altering the issues between the parties on the trial.” (*Muldrow v. Bates*, 5 Mo. 214.) Now this act is remedial in its nature, and therefore to be liberally construed; and it would be assuming too much to say that the legislature meant nothing by the use of such vigorous and comprehensive language; and it would be assuming still more, to hold that though the act meant something,

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yet that it has no bearing on a case of this sort. Presumptively, the personal property of the wife is that of the husband. *Hydrick v. Burke*, 30 Ark. 124; *Seitz v. Mitchell*, 94 U. S. 580. In the case last cited, it was held that in the absence of evidence that the wife purchased the property with her own separate funds, the presumption is a violent one that the husband furnished the means of payment. (16 Am. Law. Reg. 505.) There is nothing apparent of record to combat this usual presumption by showing the wife the owner of a separate estate in the property levied on. We all therefore hold that it will be "in furtherance of justice," and not against "the right and justice of the matter in suit," (2 Wag. S., p. 1,037, § 20,) to make the amendment desired, since we must assume, and the record warrants us in so doing, that the wife's interest in the partnership property belonged to the husband. And the consent by the husband to the rendition of judgment against him, must be regarded as an assent to and ratification of the purchase of the goods by the wife, even had she no prior authority. (2 Sm. Lead. Cas. 433, 437, 449, and cas. cit.) We therefore reverse the judgment and remand the cause, with directions to proceed conformally to this opinion. All concur, save Hough, J., who dissents.

REVERSED.

*Dissenting Opinion.*

HOUGH, J.—I concede the power of this court to review, under the present writ of error, the judgment of the circuit court rendered at the August term, 1874, and to direct the circuit court to enter the judgment it should have entered, although no appeal was taken from that judgment. A similar ruling was made in *Jones v. Hart*, 60 Mo. 352. But I object to the extensive scope given in the opinion of the court, to the statute of jeofails. I object to giving courts of first instance the power to review

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and reform their erroneous judgments, after the term at which they were rendered has lapsed. Courts of first instance have the power, under the statute, to set aside judgments for irregularity, at any time within three years after their rendition. But this provision was never intended to authorize them to exercise the ordinary powers of an appellate tribunal with reference to their own judgments. This was not a case for a writ of error *coram nobis*, as it appears from the original petition on which the judgment was rendered, that one of the defendants was a married woman. *Ex parte Toney*, 11 Mo. 661. The distinction between erroneous and irregular judgments is so well established, that there is but little room left for two opinions on the subject. The judgment in question was doubtless erroneous, but it was not an irregular one, within the meaning of the statute, and the circuit court had no power to set the same aside for irregularity. The power, conferred by the statute to amend any record, pleading, process, entries, returns, or other proceedings, in affirmance of a judgment, is not power to amend the judgment itself. For a definition and examples of irregular judgments, *Vide Tidd's Prac.* 512, 513; *Ashby v. Glasgow*, 7 Mo. 320; *Stacker v. Cooper Circuit Court*, 25 Mo. 401; *Doan v. Holly*, 27 Mo. 256; *Moss v. Booth*, 34 Mo., 318; *Lawther v. Agee*, 34 Mo. 372; *Harbor v. P. R. R. Co.*, 32 Mo. 423; *Harkness v. Austin*, 36 Mo. 47; *Downing v. Still*, 43 Mo., 309; *Jones v. Hart*, 60 Mo. 351; *Simms v. Gray*, *ante* p. 613; *Murray v. Purdy*, *ante* p. 606. In *Harbor v. P. R. R.*, *supra*, Dryden, J., delivering the opinion of the court, said: "Where there is any irregularity in the proceedings, the court will, on motion, at a subsequent term, set aside the judgment, or do whatever the justice of the case may require, but, where the proceedings are regular, however erroneous, the power of the court to interfere, ceases with the term at which the proceedings are had. In the case under consideration, no irregularity in the proceedings are brought to the notice of the court. The case was regularly for trial, and, so



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far as we can see, was regularly tried." By reference to the case of *Ashby v. Glasgow*, *supra*, it will be seen that Judge Scott was of opinion that "an error in the court in rendering judgment, is not cured by the statute of jeofails; it can only be corrected by appeal or writ of error." I therefore dissent from the opinion of my associates

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LAKEY V. CHADWICK, *Appellant*.

**Obligation Payable in Merchandise:** TENDER. A merchant having an established place of business executed a contract for the payment of money in one year after date, but containing a stipulation that it should be "payable in merchandise to be taken during the year." *Held*, that he was under no obligation to tender the merchandise. Readiness on his part at his place of business whenever called upon by the creditor, to perform the contract, prevented any default being attributed to him. It was the duty of the creditor to select and take at his place of business such articles as he desired.

*Appeal from Buchanan Circuit Court*—HON. JOS. P. GRUBB, Judge.

*E. O. Hill* for appellant.

1. As the obligation was payable in merchandise, to be taken during the year, plaintiff could not recover without a demand on defendant and a refusal to pay according to the terms of the obligation. *Labeaume v. Hill*, 1 Mo. 42; *Weil v. Tyler*, 38 Mo. 545.

2. Plaintiff could not recover without first demanding payment, because the obligation was not a promissory note. Story, *Prom. Notes*, (1st Ed.) p. 19, § 17, p. 20, § 18; Parson's *Cont.*, (Ed. 1853,) p. 209.

3. Triable issues were presented by the pleadings, and, therefore, the action of the court in rendering judgment on the pleadings was an error. *Mechanics Bank v. Fowler*, 36 Mo. 33; *Loler v. Cool*, 37 Mo. 85.

*Doniphan & Reed* for respondent.

1. No demand is necessary before bringing suit on a note payable in specific property, on or before a day therein specified. 2 Iowa 251; 7 Watts 380; 17 Vt. 105; 12 Ill. 68.

2. When the year elapsed and the note was not discharged by payment in merchandise, then the absolute promise of the defendant to pay in money became actionable. 20 U. S. Dig. 798, § 500; *Nesbitt v. Pearson*, 33 Ala. 668; 6 Ind. 328; 2 Penn. 301.

3. The general rule is that the person to be discharged from liability upon a contract by the performance of a certain act or condition, is bound to do the act or perform the condition which is to exonerate him. Chitty's Cont. 724 and note 726.

4. It was defendant's duty, during the year, either to have paid the note in merchandise, or to have so tendered the goods as to have operated a discharge of the obligation; and to have been effectual as a plea, the answer should have set up a tender within that time, and should have contained a description of the property, and the articles should have been properly designated. 3 Clark (Iowa) 518; *Dumas v. Hardwick*, 19 Texas 238; *Slingerland v. Morse*, 8 Johns. 474; *Sheldon v. Skinner*, 4 Wend. 528, 525; *Lamb v. Lathrop*, 13 Wend. 95; 7 Conn. 110; 4 N. H. 46; 14 Vt. 457; 4 Barr. 169; *McJilton v. Smizer*, 18 Mo. 117; 3 Blackford 490.

SHERWOOD, C. J.—This suit was commenced in May, 1875, and the petition is as follows: Plaintiff states that on the first day of February, 1874, defendant, for a valuable consideration, executed and delivered to plaintiff his obligation in writing, of which the following is a copy:

ST. JOSEPH, Mo., Feb. 1st, 1874.

One year after date I promise to pay to Amos S.

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Lakey, or order, the sum of Five Hundred Dollars, without defalcation, for value received, and with interest at ten per cent. per annum from date. Payable in merchandise to be taken during the year.

\$500.

W. L. CHADWICK.

Which said written obligation is herewith annexed, and herewith filed; that the year next ensuing after the date of said obligation has elapsed, and said defendant has not discharged the same by electing to pay said obligation in merchandise, except as to the amount of \$277, paid March 26th, 1874; that there is now due plaintiff on said obligation the sum of \$230.62, and interest thereon, from said March 26th, 1874, at the rate of ten per cent. per annum, for which sum and interest, with his costs herein, plaintiff asks judgment. The defendant filed answer as follows: Defendant, for answer to plaintiff's petition herein, denies that he did not elect to pay said obligation in merchandise except as to the amount of two hundred and seventy-seven dollars, but charges and avers that he did elect to pay the whole of said obligation in merchandise, before the expiration of the year mentioned in said obligation. And for a further answer and defense, defendant says that at the time of the making of said obligation, the defendant was residing in the city of St. Joseph, Missouri, and was carrying on the business of a merchant and auctioneer at his store or place of business, in said city, and that he has resided in said city and carried on the business aforesaid, in said city, ever since the execution of said obligation, all of which was well known to the plaintiff; that defendant, at all times since the date of said obligation, has had merchandise of different kinds at his said place of business, in the city aforesaid, greatly more than was necessary to pay off and discharge said obligation; that defendant set apart merchandise of different kinds at his said place of business for the plaintiff, and has kept the same and now has said merchandise ready for plaintiff, and has at all times had the same so set apart for plaintiff to take the same, but

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the plaintiff has failed to take the same, except as stated in plaintiff's petition, and has failed to demand the same of defendant. Defendant hereby tenders said merchandise to plaintiff in full payment and discharge of said obligation; and having fully answered, prays to be discharged with his cost. The plaintiff successfully moved for judgment on the pleadings, on the ground that the answer contained no defense to the action. A motion to set aside this judgment was unsuccessful, hence this appeal.

The motion for judgment on the pleadings must be regarded as tantamount to a demurrer, and as confessing the truth of the answer's allegations. It thus appears that, at the time of making the contract sued on, and ever since down to rendition of judgment, defendant was in active business as a merchant in the city of St. Joseph, where the contract was made, and where, also, it was presumptively, to meet with performance; that, as was well known to plaintiff, defendant has resided in the city and has continuously kept at his place of business greatly more merchandise of different kinds than was necessary to pay off and discharge the obligation in suit; that defendant has at all times kept and now has such merchandise kept, and set apart, and ready for plaintiff to take the same, but that plaintiff has failed to take the same, except to the extent mentioned in the petition, and has failed to demand the same, and that defendant tenders to plaintiff such merchandise in full payment and discharge of the obligation. It is doubtless time, as asserted by counsel for plaintiff, that when a note for a certain sum is payable at a certain time, but to be discharged in specific articles, then, if the payor makes default as to the payment of such articles, within the time limited, the obligation becomes one payable in money alone. But the pertinent inquiry at once occurs: Has the defendant made default in any particular whatever? The gist of the contract evidently is, that the debt evidenced by the note, is payable in merchandise, not at any particular time, but at any time dur-

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ing the course of the year, and though there is conflict of authority, on the point, the better, and confessedly the more rational doctrine appears to be that the place of payment was, in the present instance, at the store of the debtor, (1 Pars. Cont. p. 536,) and, it is to be observed that the contract is not for the payment in specific articles, but the note is "payable in merchandise to be taken during the year." This language evidently constituted the plaintiff the actor. It clearly devolved upon him to take, select or choose what articles of merchandise he desired. The defendant was powerless; all he could do, was to have at his store, miscellaneous merchandise in sufficient quantity ready for delivery, when the plaintiff made his selection. And this, the answer confessed to be true, avers the defendant did do; and this was all that could possibly be required at his hands. It is idle to speak of defendant's duty to have "tendered the goods." What goods should he have tendered? If the contract had been made payable in a particular class of goods, authorities might perhaps be found giving color to the assertion that a tender was necessary, in order to conform to the obligation assumed. But surely none can be found giving utterance to the doctrine that a payor must, at his peril, make a tender of articles, which neither the contract nor the action of the payee has sufficed to designate. Mr. Parsons says: If the contract be merely that the creditor may have them, (*i. e.* the goods,) with no words or acts that they were to be carried to him, it should be enough if they are ready for him when he comes for them. (1 Pars. Cont. 535.) This language indicates the true rule, although not used respecting words so plainly expressive of the intention of the parties, as those in the contract before us. Owing to the very terms of the contract, any tender during the year was as unnecessary, as it was in the nature of things impossible. The readiness of the payor at his place of business, whenever called upon by the payee, to comply with and perform the contract, must prevent any default



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being attributable to the former, and likewise any advantage from being obtained by the latter in consequence of his failure to call for the merchandise during the year. Holding the answer sufficient, we reverse the judgment and remand the cause. All concur.

REVERSED.

GLASSCOCK, *Slaintiff in Error* v. GLASSCOCK.

1. **Pleading Consideration of a note.** In declaring upon a written promise to pay money, it is not necessary to aver a consideration for the promise, but if one be averred, it must be a good consideration; otherwise the petition will be demurrable.
2. **Contract for Forbearance: PLEADING CONSIDERATION.** An agreement to give a debtor further time in which to make payment is an agreement for forbearance for a reasonable time.

In declaring upon a written promise to pay money made on the consideration of such an agreement, while it is not necessary to plead the consideration, yet if it is pleaded, the petition should state the time of forbearance actually extended. It is not sufficient to state that the creditor gave his debtor further time in which to pay, and did then forbear to enforce payment.

*Appeal from Ralls Circuit Court.*—HON. JOHN T. REDD,  
Judge.

*William Christian and B. G. Barrow* for plaintiff in error.

1. The agreement to pay compound interest is predicated upon a forbearance to sue upon a valid claim, which is always a sufficient consideration to support a promise. Chitty on Cont., (11th Am. Ed.) Vol. 1, pp. 35, 36; *Stewart v. Petree*, 14 Am. Rep. 332.

2. Where no special time of forbearance is fixed by agreement, the law will imply a reasonable time to be meant by the parties, Chitty on Cont., pp. 40, 41; and the question of reasonable time is to be determined from the circumstances

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of the parties at the time the contract is made, Chitty on Cont., p. 1062; being a question of law for the courts, after hearing the evidence, it need not be averred that plaintiff waited a reasonable time before bringing suit.

3. The contract for compound interest, which is nothing more than interest upon interest, is not in contravention of law. 1 Wag. Stat., p. 783, § 6; *Wilcox v. Howland*, 23 Pick. 167; Gen. Stat. of 1855, p. 889, §§ 1, 2.

*W. H. Hatch* for defendant in error.

1. There is no averment of a forbearance, either absolutely or for a certain time, or for a reasonable time; and no averment that, in consideration of the agreement, plaintiff did forbear to institute his suit from the date of the contract to any particular day or time, or for a reasonable time.

2. Before the revised statutes of 1855, parties in this State could not prospectively agree that interest should bear interest, *Gunn v. Head*, 21 Mo. 431; and the contract alleged was entered into November, 1865, and comes within the operation of the 6th Sec. Chap. 85, R. S. 1855, Vol. 1, p. 891, and the words of the statute must be used, and other expressions will not answer. *Bailey v. Smock*, 61 Mo. 213; *Thomson v. Roatcap*, 27 Mo. 283; *Stoner v. Evans*, 38 Mo. 461.

HOUGH, J.—The only question presented by the record in this cause, is the sufficiency of the following petition: "Plaintiff states that on the 13th day of November, 1860, the defendant (with one James M. Mills, who is not sued in this cause,) executed and delivered to plaintiff their promissory note, by which they promised, for value received, to pay plaintiff, thirty days after the date thereof, the sum of four thousand eight hundred and eighty-two and 56-100 dollars, with interest thereon from date, at the rate of ten per cent. per annum. Plaintiff further states that on or about the 7th day of November, 1865, after said note

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became due, and was still unpaid, he demanded payment thereof from defendant and said Mills, or that they would agree to pay to plaintiff compound interest on the same from the date thereof, to-wit: November 13th, 1860, and that on said 7th day of November, 1865, the defendant and said Mills, in consideration of the plaintiff giving them further time in which to pay said note, and that the plaintiff would not then enforce the payment of the same, promised and agreed in writing, which is herewith filed, to pay to the plaintiff compound interest on said note from the date thereof, to-wit: November 13th, 1860; that plaintiff accepted said promise, and did give the defendant and said Mills further time in which to pay the same, and did then forbear to enforce the payment of the same. Plaintiff avers and charges that the defendant has failed to keep and perform his part of said agreement in this, that he has failed and refused to pay to the plaintiff compound interest on said note, by reason whereof plaintiff says he is damaged in the sum of eight hundred dollars, for which he asks judgment." The defendant demurred on the ground that the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained and final judgment entered thereon for the defendant, and the plaintiff has brought the case here by writ of error.

The chief objection made to the foregoing petition, and the only one which it will be necessary to notice is,

1. PLEADING CON-  
SIDERATION OF A  
NOTE.

that it contains no sufficient averment of a consideration to support the alleged promise. It was wholly unnecessary to aver any consideration. The 6th section of chapter 34, Wag. Stat., in relation to contracts and promises, provides that all instruments in writing, whereby any person shall promise to pay to another any sum of money or property therein mentioned, shall import a consideration, and be due and payable as therein specified. The pleader, however, having undertaken to set forth the consideration of the promise declared upon, must plead a good consideration; and if an insufficient

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consideration be pleaded, it may be taken advantage of by demurrer.

An agreement to *forbear*, either absolutely or for a certain time, or for a reasonable time, to institute or prosecute legal or equitable proceedings to enforce a legal or equitable demand, is a sufficient consideration to support a promise of a third person, as well as of the person liable to suit. Chitty on Contracts, Vol. 1, pp. 35-36. "Forbearance, it is said, must be for a certain time, or for a reasonable time. And the weight of authority is, that forbearance, *per breve or paululum tempus*, is not a consideration of any value in law; for a suit may be immediately brought, notwithstanding the brief forbearance of an hour or a day." Metcalf on Contracts, 174. In the present case the forbearance stated in the petition is an indefinite forbearance; this was at first held to be insufficient. *Phillips v. Sackford*, Cro. Eliz. 455. But it has been since held that by a promise to forbear indefinitely, the court will intend the forbearance to be total and absolute. *Thorn v. Fuller*, Cro. Jac. 397; *Cowlin v. Cook*, Latch, 151; *Lonsdale v. Brown*, 4 Wash. C. C. Rep. 151. "A promise to forbear in general, without adding any particular time, is to be understood a total forbearance." *Hamaker v. Eberly*, 2 Binn. 506, affirmed in *Clark v. Russel*, 3 Watts 213. In all of the foregoing cases, where there was a promise to be answerable for the debt of another, in consideration of the forbearance stipulated for, it might well be held that a general or indefinite forbearance to the original promissor was intended to be total and absolute. But in the case at bar, it is inconceivable that the plaintiff engaged absolutely to forbear the collection of a debt, which, with interest, amounted at the time the engagement was entered into, to over \$7,000, in consideration of an undertaking on his part to pay compound interest up to that time upon the debt so forgiven and discharged. Besides the undertaking to forbear, as alleged in the petition, will not admit of any such construction. The lan-

2. CONTRACT FOR  
FORBEARANCE:  
pleading consid-  
eration.

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guage of the petition is, that the defendants "in consideration of the plaintiff giving them further time *in which to pay said note*, and that the plaintiff would not then enforce the payment of the same, promised and agreed," etc. This language evidently contemplates a forbearance which was to be followed by payment, and must be held to mean forbearance only for a reasonable time; and in declaring on a promise made upon such consideration, the rule is that the plaintiff must, in stating the consideration, allege the time of forbearance actually given, and if it be judged reasonable and sufficient, the action will be sustained; for it is said, forbearance for a reasonable time, is a subject of judicial understanding. Metcalf on Contracts, 175. "If one promise to pay the debt of another, in consideration that the creditor will forbear and give further time for the payment of the debt, this is a sufficient consideration, though no particular time of forbearance be stipulated; the creditor averring that he did thereupon forbear from such a day till such a day." *King v. Upton*, 4 Greenl. (4 Maine,) 387; *vide* Hardres' R., 5, *Barnhurst v. Cabot*. The petition is defective in failing to state the time of the forbearance extended by the plaintiff, and the demurrer was therefore properly sustained. The judgment of the circuit court will be affirmed. The other judges concur.

AFFIRMED.

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STATE V. GREEN, *Appellant*.

1. **Indictment: SUFFICIENCY OF.** The averments contained in the indictment itself, determine its sufficiency; not those that may be found in the copy furnished the defendant.
2. ———: **RIGHT TO TRUE COPY OF: WHEN WAIVED.** The defendant has, under our statute, a right to a true copy of the indictment, 48 hours before his trial, and, if an incorrect copy is furnished, he has the right to demand a true copy, and delay the trial until it is furnished; but, if he pleads without such copy, and makes no objec-



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tion for want of it, he cannot after verdict, on that account, claim a new trial. *Lisle v. State*, 6 Mo. 428, followed.

3. **Practice, Criminal:** INDICTMENT CONTAINING SEVERAL COUNTS: MOTION TO COMPEL THE STATE TO ELECT. When there are several counts in an indictment, a motion to compel the State to elect on which count the case shall be tried, is addressed to the sound discretion of the trial court, and the Supreme Court will not interfere with its ruling, unless it is clear that the discretion has been abused to the injury of the accused.
4. **Thanksgiving day:** SUNDAY: COMPUTATION OF TIME. Thanksgiving day, although by statute a public holiday, and, for certain purposes, considered to be the same as Sunday, is properly counted as part of the 48 hours within which the defendant is required to make his challenges, after he is furnished with a list of jurors; in computing statute time, Sunday itself should be counted unless expressly excepted.
5. **Indictment for Murder:** EVIDENCE. Under an indictment for murder in the ordinary form, proof may be made that the deceased was an officer, regularly appointed and qualified, and that he was acting within his jurisdiction, and in the discharge of his duty when killed.
6. **Killing of Officer:** OFFENSE AT COMMON LAW, UNDER THE STATUTE. At common law, where an officer, having authority to arrest, whether it be for misdemeanor or felony, and using the proper means for that purpose, is resisted and killed, it is murder in all who take part in such resistance.  
Under the statute, (Wag. Stat., p. 445, Sec. 1), it is murder in the first degree only—when the person whose arrest is attempted, is charged with the commission of a felony.
7. **Definition of Felony:** ASSAULT WITH INTENT TO KILL. Under the statute defining felony (Wag. Stat., p. 516, Sec. 33), any offense is a felony which is liable to be punished by imprisonment in the penitentiary. The fact that it may also be punished by fine, or by fine and imprisonment in the county jail, does not alter its character, (following *Johnston v. State*, 7 Mo. 183). Assault with intent to kill is a felony.
8. **Murder in First Degree.** Willfulness, deliberation and premeditation are not elements necessary to constitute a homicide committed in the perpetration, or attempt to perpetrate a felony, murder in the first degree.
9. **Arrest:** NOTICE OF OFFICER'S AUTHORITY, WHAT SUFFICIENT. An officer duly appointed and qualified, and authorized by a warrant to arrest any offender, gives sufficient notice of his authority to do so by reading to him the warrant of arrest.

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10. **Murder: MANSLAUGHTER: INSTRUCTIONS.** Where an officer of the law, provided with a legal warrant of arrest, reads the same to the person whose arrest is ordered, and informs him of the offense with which he is charged, and attempts to execute the warrant in a lawful manner, and, while so doing, is shot down by such person without provocation, either by word or act, and the killing is deliberately and premeditatedly done; *Held*, not to present a case for instructions in regard to murder in the second degree, nor in regard to manslaughter in any of its degrees.
11. **The Duties of a Deputy Marshal** being defined by law, he may execute a warrant placed in his hands without special instructions from his principal.
12. **A Grand Jury** may consist of twelve men.

*Appeal from Jackson Criminal Court.*—HON. HENRY P. WHITE, Judge.

*Blake L. Woodson* for appellant.

1. A defendant, when charged with a capital offense, must be furnished with a copy of the indictment; he is not bound to look beyond the certified copy, and when this states no offense, the indictment should be quashed, or a correct copy furnished. 2 Wag. Stat, p. 1095, Sec. 2.

2. The State should have been compelled to elect counts for trial, and should not have been allowed to wait until the evidence was in, and then ask instructions on the second count alone.

3. The list of jurors should have been furnished defendant at least forty-eight hours before trial; but of the forty-eight hours allowed in this case, one whole day was a legal holiday.

4. 1 Wag. Stat., p. 479, Sec. 20, provides a special punishment for resisting an officer, but no such penalty is provided for killing an officer. 1 Wag. Stat., p. 445, Sec. 1, defines murder in the first degree. The third instruction gives another definition, and withdraws entirely from the jury the statutory requirements of "willful, deliberate and premeditated killing," and substitutes therefor the fact of deceased being a legal officer, having a legal war-

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rant, which he reads or exhibits with information of the substance of its contents, and the further fact that he was proceeding in a quiet and lawful manner to arrest the defendant. It dispenses with all knowledge on the part of defendant of the officer's official character, which was required even at common law. *Roberts v. State*, 14 Mo. 147; *Kelly Cr. L. & P.*, § 492; *Commonwealth v. Drew*, 4 Mass. 391; *Logue v. Commonwealth*, 2 Wright 265; *Rafferty v. People*, 69 Ill. 111; *State v. Daubert*, 42 Mo. 242; *State v. Smith*, 53 Mo. 267.

5. The first and second instructions asked by the defendant, should have been given. The whole transaction took place in three or four minutes. There were no preconcerted threats nor plan, on the part of the defendant, to resist or kill the officer; he did not know the officer when he came in, nor the officer him. Under such circumstances the court should have left the jury to say whether the killing was intentional, malicious, and without just cause, constituting murder in the second degree, or all this, and willful, deliberate and premeditated, in addition. *State v. Oliver*, 2 Houst. (Del.) 585; *State v. Lane*, 64 Mo. 310; *Roberts v. State*, 14 Mo. 147; *Commonwealth v. Drew*, 4 Mass. 391.

6. The third instruction asked by defendant should have been given. *Kelly Cr. L. & P.*, § 492; *Bishop Cr. Pro.*, Ed. 1866, §§ 647-8-9; 32 N. Y. 509; *Logue v. Commonwealth*, 2 Wright (Penn.) 265; *State v. Kirby*, 2 Iredell 201; *Rafferty v. People*, 69 Ill. 111.

7. Also, the 4th, 5th, 6th, 7th, and 8th instructions. *Bishop's Cr. Law*, (4th Ed.) §§ 383-4; *Rex v. Geo. Hood*, British Cr. Cas. 281; S. C., 1 Moody 281; *Griswold v. Sedgwick*, 1 Wend. 126; *Griswold v. Sedgwick*, 6 Cow. 456; *Gurnsey v. Lovell*, 9 Wend. 319; 2 N. H. 318; 1 Bald. 239; 3 Harrington 416; *Shorter's case*, 2 Comst. (N. Y.) 193.

8. The indictment was returned into court by a grand jury of twelve men, March 2nd, 1877, by virtue of the constitution of 1875, Art. 2, Sec. 28. This constitutional pro-

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vision was in conflict with the law then existing, and required legislation to enforce the same, which was afterwards had in 1877. Sess. acts of 1877, p. 278; Const. of Mo. Sched., Sec 1; Sec. 12, p. 14; *Han. & St. Joe R. R. Co. v. State Board, &c.*, 64 Mo. 304, 294; *St. Joe & Den. City R. R. Co. v. Buchanan Co. Ct.*, 39 Mo. 489, 485; 15 Peters 449; 3 Wheat. 336.

9. The warrant under which Hughes attempted to arrest defendant was not for a felony, as that term is used in Sec. 18, p. 479, Wag. Stat. *State v. Thompson*, 30 Mo. 470.

*J. L. Smith*, Attorney-General, for the State.

1. The motion to quash was properly overruled, because not directed to the original indictment, but to an incorrect copy. As he did not demand a correct copy, he is presumed to have waived the same. *State v. Jackson*, 12 La. An. 679; *Lisle v. State*, 6 Mo. 426.

2. The motion to compel an election by the State of the count upon which it would proceed to trial was properly overruled. *State v. Turner*, 63 Mo. 436; *State v. Sutton*, 64 Mo. 107; *State v. Porter*, 26 Mo. 201.

3. The rule is well settled that, when one of the intervening days is a holiday, such day is counted in computing statute time. *King v. Dowdall*, 2 Sandf. 131; *Ex parte Dodge*, 7 Cowen 147; *Easton v. Chamberlain*, 3 How. Pr. 412; *Taylor v. Corbiere*, 8 How. Pr. 385; *Anderson v. Baughman*, 6 Mich. 298; *Goswiler's estate*, 3 Penn. 200; *Franklin v. Holden*, 7 R. I. 215.

4. At common law, the killing an officer by one whom he is attempting to arrest under a legal warrant, is murder. 1 East P. C. 309; 1 Hale, P. C. 464 and note, 465, 457; 2 Hale, P. C. 118; *State v. Will*, 1 Dev. & Bat. 121; *Boyd v. State*, 17 Ga. 194; *Angell v. State*, 36 Tex. 542; *State v. Oliver*, 2 Houst. (Del.) 585, 604. Under our statute a homicide committed in the perpetration or at-

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tempt to perpetrate any felony, is murder in the first degree. Wag. Stat., p. 445, Sec. 1. It is a felony to resist an officer in the service of a warrant in any case of felony. Wag. Stat., p. 479, Sec. 18. Assault with intent to kill, is a felony. Wag. Stat., Secs. 29, 32, 33, pp. 449, 450. So that, clearly, this murder was committed in the attempt to perpetrate a felony, and was, therefore, murder in the first degree. The defendant was resisting an arrest for felony, which was in itself a felony, and the law presumes the necessary malice from the simple act of killing. *State v. Foster*, 61 Mo. 549; *State v. Lane*, 64 Mo. 319; *State v. Wieners*, ante p. 13; *Brooks v. Com.*, 61 Pa. St. 352.

5. It was not necessary to allege in the indictment that Hughes was a deputy marshal, and had a legal warrant, etc. *State v. Roberts*, 15 Mo. 36; *Boyd v. State*, 17 Ga. 194; 3 Chitty Crim. Law, 172; Mackalley's case, 9 Coke 111, 65.

6. The production by Hughes of the warrant to arrest the defendant was sufficient notice to him of the fact that he was deputy marshal of Jackson county; as such, he was empowered by the statute to perform any of the duties prescribed by law for the marshal. Acts of 1871, p. 87, § 10; Whart. on Hom., §§ 240, 252; *State v. Weed*, 1 Foster (N. H.) 262; *Tom v. State*, 8 Humph. 86; *State v. Oliver*, 2 Houst. (Del.) 585; *People v. Pool*, 27 Cal. 572; Roscoe's Crim. Ev., 755, 760; 1 Russ. on Crimes, 627; 1 Hale's P. C., 461, 578; *Rex v. Curtis*, Foster 135; *Arnold v. Steeves*, 10 Wend. 514; *State v. Caldwell*, 2 Tyler (Vt.) 212; *Com. v. Cooley*, 6 Gray 350; *Drennan v. People*, 10 Mich. 169, 183; *State v. Wetherall*, 5 Harring. (Del.) 487; *Johnson v. State*, 30 Ga. 426; 2 Hawk. P. C., Ch. 13, § 28, p. 137.

7. If Hughes designated Green by any name, and told him that he had a warrant for him, it was Green's duty to submit to the arrest, and then demand to be discharged, if the warrant was in fact for Smith; if he chose to resist the arrest on that ground, he did so at his peril. *U. S. v. Travers*, 2 Wheat. C. C. 510; *State v. Jones*, 16 Mo. 388.



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8. A grand jury composed of twelve men, was a legal grand jury. Art. 2, Sec. 28, Const. of 1875. This section was self executive, and required no legislation to enforce it. *State v. Dearing*, 65 Mo. 530.

NORTON, J.—At the February term, 1877, of the criminal court of Jackson county, at Independence, the defendant was indicted jointly with one Frank Miller, for murder in the first degree for the killing of Henry H. Hughes. The indictment contained three counts, the first of which charged Green and Miller jointly as principals; the second charged Green as principal and Miller as being present, aiding, abetting, &c.; and the third charged Miller as principal and Green as being present, &c. The defendants were duly arraigned, and each pleaded not guilty, and on motion of each, a severance was ordered. On application of the defendant, the venue of the cause, as to him, was changed to the criminal court at Kansas City. He afterwards filed a motion to quash the indictment, attaching to his motion, what purported to be a copy of said indictment which was furnished him, and alleging that said copy charged no offense, and therefore the original should be quashed. This motion was by the court overruled. He thereupon filed his motion to compel the State to elect upon which count it would proceed, which the court overruled. The empanneling of a jury was then proceeded with, and, on November 28th, a list thereof was delivered to defendant, and the cause was postponed till November 30th, on which day the defendant objected to announcing his challenges, for the reason that, as one of the days intervening since he had been furnished with the list was Thanksgiving day, he had not been allowed his full forty-eight hours, which objection the court overruled. The evidence on the part of the State showed that the deceased was duly appointed deputy marshal of Jackson county by the marshal thereof, and his appointment duly confirmed and recorded, and the oath administered; that, on the 6th

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day of February, 1877, the following warrant was delivered to him by the marshal of Jackson county:

*Warrant of Arrest.*

The State of Missouri to the Marshal of Jackson county,  
Greeting :

Whereas, Isaac Gardner, of the county of Jackson, hath this day given information upon oath to me, J. C. Ranson, a justice of the peace within and for said county of Jackson, that, on the 4th day of February last past, at the county aforesaid, one George Tarwater, one Richard Green and one Frank Miller, did assault and shoot at one Henry Mensing and Isaac Gardiner, from pistols loaded with powder and bullets, with intent to kill them, the said Henry Mensing and Isaac Gardiner; these are therefore to command you forthwith to apprehend the said George Tarwater, Richard Green and Frank Miller, and bring them before me to answer the premises, and further to be dealt with according to law. Given under my hand at the county of Jackson, aforesaid, this 5th day of February, A. D. 1877.

JOS. C. RANSON,

Justice of the Peace.

That Ranson was a duly appointed and qualified justice of the peace within and for Jackson county. To all this evidence defendant objected, because there was no allegation in the indictment that Hughes was a deputy marshal of Jackson county, which objection was by the court overruled.

The evidence on the part of the State further showed that Green, Miller, one Winn and Gilchrest were working as wood choppers for one Fisher, and were together in the shanty, about six miles east of Independence; that, on the evening of February 10, 1877, Hughes met Fisher, and asked him if he had hired any new hands lately, to which Fisher replied that he had, and Hughes asked to see them; that Fisher and Hughes together came into the

cabin, and Hughes addressed Miller and Winn, mistaking Winn for Green, whereupon Winn said he was mistaken, and Fisher pointed to the defendant, and said that was Green; that Hughes then drew forth his warrant and said he had a warrant for Frank Miller and Richard Green, and asked Miller to give him his pistol, and then read his warrant to them; that when Hughes commenced reading, Green drew a pistol out of his left hand pocket and passed it behind him and took it in his right hand, and as soon as Hughes ceased, said, "God damn you, get out of here!" and fired at him; that two shots were fired in immediate succession, when Green again fired, and Hughes fell out of the door, saying, "I am killed," and died within five minutes after. On cross-examination the witnesses stated that Hughes did not notify the parties that he was the deputy marshal, and gave no notification of his official character other than to say that he had a warrant for Frank Miller and Richard Green, producing it; that he had his hand in the right pocket of his overcoat and held the warrant in his left hand. The physician who examined Hughes stated that he came to his death from two wounds in his right breast, made by pistol balls. The defendant objected to evidence of more than one wound, which objection being overruled, he excepted. James W. Liggett, the marshal, testified that he gave this warrant to Hughes, with directions to ascertain the whereabouts of the parties named, and identified the warrant heretofore set forth as being the one. On cross-examination, the witness stated that he did not direct Hughes to arrest them. On the part of the defendant, Frank Miller and defendant, himself, testified that, on the night of the killing, Hughes and Fisher came into the cabin, and Hughes spoke to Miller, asking him if his name was Miller, and upon receiving an affirmative answer, spoke to Winn, calling him Smith, and that Fisher, then nodding towards defendant, said that was the man, and Hughes said he had a warrant for them, charging them with an assault with intent to kill, and they had to

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come with him to Kansas City, whereupon Green stated that he could not arrest him without a warrant, and drew his pistol and told him to go out; that Hughes and he fired at the same time, and Green fired a second time; that Green and Miller then ran into the woods and hid until they were captured.

The court thereupon gave the following instructions on the part of the State: That if the jury believe from the evidence, that on or about the tenth day of February, 1877, at the county of Jackson and State of Missouri, the defendant, Richard Green, willfully, deliberately, premeditatedly, and of his malice aforethought, killed Henry H. Hughes, in manner and by the means as charged in the second count of the indictment, then the jury must find the defendant guilty of murder in the first degree, and the jury are further instructed that the deliberation and premeditation necessary to constitute murder in the first degree, may be inferred from the circumstances connected with the killing, and if such deliberation and premeditation existed for a moment before the killing, it is sufficient. The second instruction defined the words "willfully, deliberately, premeditatedly, and malice," as used in the foregoing instruction.

3rd. That if the jury believe from the evidence, that the deceased, Henry H. Hughes, at the time he received the fatal wound, was the legally appointed deputy marshal of Jackson county, and that he had in his possession a warrant issued by J. C. Ranson, a justice of the peace of Jackson county, commanding him to arrest the defendant Richard Green, and that the deceased read to the defendant, or in his hearing, the warrant for his arrest, or notified the defendant that he had such warrant, and exhibited the same to him, stating to him the substance of its contents; and if they shall believe from the evidence, that the deceased was proceeding in a quiet and lawful manner to arrest defendant, and that defendant resisted such arrest,

and shot and killed the deceased to avoid arrest, then such killing is murder in the first degree.

4th. That if the jury believe from the evidence, that the deceased, Henry H. Hughes, was the legally appointed deputy marshal of Jackson county, and that he had in his possession a warrant issued by J. C. Ranson, a justice of the peace of Jackson county, commanding him to arrest the defendant, Richard Green, then the deceased had a right to arrest him, and might use such force as might be reasonably necessary to enable him to effect such arrest, and if the jury believe from the evidence, that the deceased, at the time of the fatal shooting, notified defendant of his authority to arrest him, or read to him, or in his hearing, the warrant for his arrest, or exhibited the warrant, stating to him the substance of its contents, and that the deceased used only such force and caution as might be reasonably necessary to enable him to make the arrest, and that the defendant resisted said arrest, and shot and killed the deceased, then such killing is murder in the first degree.

On the part of the defendant the court instructed the jury that they should state in their verdict, upon which count of the indictment they found him guilty, and if they had "a reasonable doubt of his guilt, it is their duty to give the defendant the benefit of such doubt, and acquit," and also gave the following instructions:

11th. Unless the jury believe from the evidence that Hughes, at the time he attempted to arrest defendant, disclosed to said defendant his, said Hughes,' official position as an officer of the law, or that said official position was at the time known to said defendant, or that said Hughes informed defendant that he had a warrant for his, defendant's, arrest, and exhibited the warrant and informed defendant of its contents, by reading the same, or stating the substance of its contents, then defendant had a right to resist such attempted arrest, and to use such means as at



the time were reasonably necessary to prevent the said arrest.

12th. If the jury believe from the evidence, that the deceased did not inform defendant of his official position, and that defendant did not know his official position, and that deceased did not inform defendant that he had a writ or warrant for his arrest, exhibiting same, and informing defendant of its contents, by reading same, or stating the substance of its contents, and that, in attempting to arrest defendant under such circumstances, deceased caused defendant reasonably to apprehend that his life was in danger, or that deceased was about to do him some great bodily harm, and he had reasonable cause to apprehend immediate danger of such purpose on the part of Hughes being accomplished, and that defendant killed said Hughes to prevent the accomplishment of such purpose, you should acquit the defendant on the ground that such killing was justifiable in law, because done in self-defense; and, in order to acquit on the ground of self-defense, it is not at all necessary that the danger apprehended by defendant should have been real or actual, or that such danger should have been then actually impending or about to fall on defendant; it is only necessary that the jury should believe that the defendant had reasonable cause to apprehend that there was immediate danger of a design to kill him, or do him some great bodily harm, and the same was about being accomplished by the deceased.

14th. Before the jury can find the defendant guilty, as charged, they must find from the evidence that the killing was done willfully, deliberately and premeditatedly, as well as intentionally and with malice aforethought.

Instructions numbered 1, 2, 3, 4, 5, 6, 7, 8 and 10 asked by defendant, were by the court refused. The first and second defined murder in the second degree. Numbers three and four told the jury that, although Hughes was an officer and had a proper and legal warrant for defendant's arrest, yet, unless defendant knew that deceased was

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such officer, his offense was manslaughter only. Number five told the jury that, as defendant had not been arrested by Hughes, they could find him guilty of manslaughter only, unless express malice were proved. Number six told the jury that if defendant shot Hughes to prevent him from arresting him, and not with intent to kill deceased, then they could convict of manslaughter in the third degree only. Number seven told them that if the actions of Hughes led defendant to apprehend that he was about to kill him or do him some great bodily harm, they should acquit, "or, at furthest, find him guilty of manslaughter only." Number eight told the jury that if the warrant was delivered to deceased by Liggett, the marshal, with directions to ascertain the whereabouts of defendant, and not for the purpose of arresting him, then such warrant did not justify him in attempting to arrest defendant, and they could "find defendant guilty, if at all, of manslaughter only." The jury found the defendant guilty of murder in the first degree. The defendant filed his motions for a new trial and in arrest of judgment, alleging therein, among other things, that the indictment herein, having been presented by a grand jury of twelve men, the court had no jurisdiction thereof, which motions being by the court overruled, he excepted, and this case is now brought here by appeal.

1. We will consider the alleged errors, of which defendant complains, in the order they appear in the above record: The motion to quash the indictment is founded principally on the ground that the copy thereof, which was given defendant by the clerk, charged no offense. The question of the sufficiency of an indictment is to be determined by the averments it contains, and not by those to be found in an incorrect copy of it. The indictment, in question, contains every averment necessary to charge the crime of murder in the first degree.

While it is true that, under our statute, the defendant

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had a right to a true copy of such indictment, forty-eight  
2. \_\_\_\_\_: right to true copy of; when waived. hours before his trial, it is equally true that if an incorrect copy be given him, its only effect would be to give him the right to demand a true copy, and delay the trial until it is furnished him: if he pleads without such copy, and makes no objection for want of it, he cannot after verdict, on that account, claim a new trial. *Lisle v. State*, 6 Mo. 428. Under a statute in Louisiana, similar to ours, which gave the defendant a right to a copy of the indictment and list of the jury, two entire days before his trial, it was held that, when the accused goes to trial without objection, it will be too late after conviction to urge as error, that he had not been served with a copy of the indictment and a list of the jury summoned to try him, and that, if an imperfect copy be served upon him, and he consent to go to trial without insisting on a perfect copy, and the delay accorded to him by law, it will be too late to make the objection after conviction. *State v. Jackson*, 12 La. An. 680.

2. The motion to compel the attorney of the State to elect on which count he would proceed, was properly overruled. Where the counts in the indictment relate to the same transaction, it is not error for the court to refuse to compel the State to elect. *State v. Turner*, 63 Mo. 436; *State v. Porter*, 26 Mo. 201; *State v. Sutton*, 64 Mo. 107. A motion to compel the State to elect, when there are several counts, is addressed to the sound discretion of the court trying the case, and this court will not interfere, unless it is clear that the discretion has been abused to the manifest injury of defendant. *State v. Daubert*, 42 Mo. 242.

3. It is insisted that, as defendant was furnished with a list of jurors on the 28th of November, the court erred in compelling him to make his challenges on the 30th of November, because the 29th day of said month was a public holiday under the proclama-

3. PRACTICE, CRIMINAL: indictment containing several counts: motion to compel the State to elect.

4. THANKSGIVING DAY: Sunday: computation of time.

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tion of the Governor of the State and the act of 1877, p. 37, and should not have been counted as any part of the forty-eight hours within which he had to make his challenges. The first section of said act provides that thanksgiving days, when appointed by the Governor of the State, or the President of the United States, shall be public holidays. The second provides that such holidays shall be considered the same as the first day of the week, called Sunday, as regards the presenting for payment or acceptance, &c., of bills of exchange, bonds, notes and other commercial paper. In the computation of time, for the purposes mentioned in the act, such holidays may not be counted, except as therein provided. The act extends thus far in estimating time, and no further. If such holidays are to be considered as Sunday for all general purposes, they would still be counted in computing statute time, unless expressly excepted. In *Ex parte Dodge*, 7 Cowen 147, it was held that Sunday has in no case been excluded in counting statute time. *Anderson v. Baughman*, 6 Mich. 298; *Franklin v. Holden*, 7 R. I. 215, are to the same effect.

4. The defendant objected to the warrant read in evidence, as well as the evidence proving that Hughes, the deceased, had been regularly appointed and qualified to act as deputy marshal for Jackson county, because these facts were not alleged in the indictment. We think the trial court is fully sustained by the authorities in overruling the objection. In case of *Boyd v. The State*, 17 Ga. 194, where the defendant was indicted for murder in killing an officer, while executing a warrant for his arrest, it was held that it was unnecessary to allege in the indictment charging the offense, that the deceased was an officer, acting in the discharge of his duty when killed, and that, under an indictment in the ordinary form, the peace warrant which the officer was attempting to execute, as well as all the other evidence tending to establish the official character of deceased was admis-

6. INDICTMENT  
FOR MURDER: evi-  
dence.

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sible. The same doctrine is laid down in 3 Chitty's Crim. Law 172, that when the indictment is for the murder of an officer, or in any case where the circumstances are complicated, it will not be necessary to set out any of the details, and that the indictment in such cases will be sufficient if it contains the general requisites of an indictment for murder. In Mackalley's case, reported in 9 Coke's Rep. 65, 111, it was, among other things, resolved by all the judges of England, who had assembled at the King's command, and by all the Barons of the Exchequer, that when an officer in the discharge of his duty was slain, "there needs not a special indictment on all the matter drawn, but a general indictment, that such a party *ex malitia sua precogitata percussit, etc.*" would be sufficient. It was further declared "that if any sheriff, under-sheriff, sergeant, or other officer, who hath execution of process, be slain in doing his duty, it is murder in him who kills him, although there was not any former malice betwixt them; for the execution of process is the life of the law, and therefore he who kills him shall lose his life; for that offense is *contra potestatem regis et legis*, and therefore, in such case, there needs not be any inquiry of malice."

5. The third and fourth instructions given on behalf of the State, are objected to on the ground that the killing

6. KILLING OF OFFICER: offense at common law: under the statute.

of Hughes under the circumstances named therein, is not murder under our statute; and also, because there was no evidence that deceased, at the time he was shot, notified defendant of his authority to arrest him. At common law, when officers having authority to arrest or imprison, and using the proper means for that purpose, are resisted and killed, it is murder in all who take part in such resistance. This protection of the law is extended only to persons having proper authority, and who use that authority in a proper manner. 1 Russ. on Crimes, 592; 1 East P. C. 309; 1 Hale P. C. 464-5; 2 Hale 118. At common law this doctrine applied as well to arrests made under a warrant for a mis-



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demeanor, as for a felony. Our statute has modified it so as to make only that murder in the first degree, when the officer is killed by a person he is attempting to arrest, charged with felony.

Section one, page 445, Wag. Stat., provides that, "Every murder which shall be committed by means of  
7. DEFINITION OF  
 FELONY: assault  
 with intent to kill poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree." Under this section, every homicide committed in the perpetration or attempt to perpetrate any felony, shall be deemed murder in the first degree. In the case of *State v. Wieners*, ante, p. 13, it was held, "that such a killing was murder, although not specifically intended, for the law attaches the intent to commit the other felony to the homicide." But it is said that the warrant, under which the deceased was acting in making the arrest, did not charge a felony, and that, therefore, the third and fourth instructions were erroneous. The offense charged in the warrant is an assault with intent to kill, which is punishable by imprisonment in the penitentiary, not exceeding five years, or by fine not less than five hundred dollars, or by fine not less than one hundred dollars and imprisonment in the county jail not less than three months, &c. It is earnestly argued that under the statute defining felonies, only those offenses are embraced which are punishable only by death or imprisonment in the penitentiary, and that the offense charged in the warrant is not included in this class. The statutory definition is as follows: "The term felony, when used in this or any other statute, shall be construed to mean any offense for which the offender shall be liable by law to be punished with death or imprisonment, and no other." While at first blush, the view contended for seems plausible, its fallacy becomes manifest, when we consider the section defining felony, in connection with Sec. 35, de-

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fining misdemeanors, which is as follows: "The term misdemeanor, as used in this or any other statute, shall be construed as including every offense punishable only by fine or imprisonment in the county jail, or both." Now, according to the view of defendant's counsel, the offense of assaulting with intent to kill would neither be a felony nor a misdemeanor. It could not be a felony, because it may be punished either by imprisonment in the penitentiary, or by fine or imprisonment in the county jail, or both; it could not be a misdemeanor, because it may be punished by imprisonment in the penitentiary. We could not, therefore, accept a construction of the statute which would make all offenses, the punishment of which may be either imprisonment in the penitentiary, or fine and imprisonment in the county jail, neither felonies nor misdemeanors. Besides this, in the case of *Johnston v. The State*, 7 Mo. 183, it was held that a felony under our act is an offense for which the party may be imprisoned in the penitentiary. The Legislatures have wisely left it to the discretion of the jury, in many cases, to inflict the punishment of imprisonment in the penitentiary, or fine and imprisonment in a county jail, and the offense charged in this indictment is one of them. Though this discretion is given to the juries, they are still felonies. The statute defining felonies was the same then as now.

It is also objected that the elements of willfulness, deliberation and premeditation are not included in the third and fourth instructions. The identical question here presented, arose in the case of the *State v. Jennings*, 18 Mo. 435. The following instruction, numbered 6, was given in that case: "If the jury believe from the evidence, that it was not the intention of those concerned in lynching Willard, to kill him, but that they did intend to do him great bodily harm, and that in so doing death ensued, such killing is murder in the first degree under our statute." In passing upon this instruction, Judge Ryland said: "The sixth instruction is correct under th

S. MURDER IN  
FIRST DEGREE.

statute of this State. Homicide, committed in the attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree. The 38th section makes the person by whose act or procurement great bodily harm has been received by another, guilty of what is by our law called a felony; that is, guilty of such an offense as may be punished by imprisonment in the penitentiary."

The further objection to the third and fourth instructions is made that there was no evidence showing that the deceased notified defendant of his authority. We think it is established, satisfactorily, by the evidence, that Hughes, the deceased, was a deputy marshal, fully authorized to execute criminal process anywhere in Jackson county, and that he notified defendant of his authority to arrest by reading the warrant. This, we think, is sufficient. When a constable commands the peace, or shows his staff of office, or shows his warrant, it is a sufficient intimation of his authority. 2 Wharton Cr. L. § 1041; Wharton on Homicide, Secs. 240, 252. An officer gives sufficient notice what he is, when he says to the party, I arrest you in the King's name. And, in such case, the party ought to obey him, though he knows him not to be an officer; and, if he has no lawful warrant, the party grieved may have his action for false imprisonment. *Hall v. Roche*, 8 T. R. 188; 1 Russ. on Cr. 624, 627; 1 East P. C. 315. It was held in case of *State v. Oliver*, 2 Houst. (Dela.) 585, that when the prisoner denied the authority of the person making the arrest, and objected to being taken by any one but the sheriff, his mistake on that subject could not excuse him for unlawful resistance to an officer duly authorized to arrest him, and who made that authority known to him. He who undertakes to resist an officer does so at his peril, if it turns out that the authority of such person or officer was valid. In case of *People v. Pool*, 27 Cal. 572, it was held that if an officer, in fresh pursuit of persons charged

9. ARREST: notice of officer's authority; what sufficient.

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with crime, comes suddenly upon and calls out, "you are my prisoner, surrender," that these words are sufficient notice of his character as an officer. In case of *State v. Caldwell*, 2 Tyler, (Vt.) 212, it was held that it is not necessary for the sheriff or his deputies to show a warrant authorizing an arrest, when he first states he is acting in virtue thereof. "The sheriff, as the known and first officer of the court, is not obliged to show his warrant to anyone. His deputies are, by statute, clothed with the same power, and their names and deputations are put upon the public records of the county, that their appointment may be known to all, and all are obliged to obey these officers." A party, who is called upon by an officer to yield himself a prisoner, may demand that the warrant be read, or that he be informed of the contents thereof. If, however, he resist before an opportunity is given the officer to comply with his request, the officer may, if he has a valid warrant, first secure the arrest. *Commonwealth v. Cooley*, 6 Gray 350; *State v. Phiney*, 2 Me. 384; 2 Hale, P. C. 116. When a sheriff, or his deputy, regularly appointed and qualified, is acting within the limits of his jurisdiction and under a warrant directed to him, knowledge of his official character might well be inferred. *Roscoe Crim. Ev.* 760, 755. The marshal of Jackson county had conferred upon him by law, the same powers as the sheriff in similar cases, and the deceased, his deputy, as the evidence shows, notified defendant of his authority, and informed him of the offense for which his arrest was demanded. The cases to which we have been cited, are not analogous to the case before us. *Logue v. Commonwealth*, 38 Penn. (2 Wright,) 265, was a case where Lewis, a private citizen, was deputed by the constable to execute a writ for the arrest of Logue, charged with robbery. Lewis armed himself with a pistol and, in company with two other persons, concealed himself about midnight behind some bushes, and as Logue and others were passing, Lewis sprang upon him, and presented his pistol at Logue's breast, saying, "stop, men,"

whereupon Logue drew his pistol, shot and killed Lewis. The case was reversed because the court refused an instruction on the law of self-defense. In the case before us, the defendant had the full benefit of an instruction on that subject. The case of *Rafferty v. The People*, 69 Ill. 111, simply decides that the warrant in the hands of the policeman, who was killed, was void, and did not authorize the arrest of Rafferty, and for that reason, it was for the jury to determine, under proper instructions, whether the killing was murder or manslaughter. *Commonwealth v. Drew*, 4 Mass. 391, is to the same effect. In *Yates v. People*, 32 N. Y. 509, the prisoner was pursued by a mob, at night, shouting and threatening his life, and was seeking to escape under apprehension of great bodily harm if overtaken. He was seized by some one in his flight, whom he instantly killed, and the pursuer thus killed, proved to be an officer. It was held that under these circumstances, it was material for the State to fix upon the prisoner presumptive knowledge of the official character of the deceased; and that this presumptive knowledge might be shown by circumstances such as, that deceased was clad in the uniform of his office, and that it was light enough for prisoner to see it. The case of *Roberts v. State*, 14 Mo. 147, and also reported in 16 Mo., is distinguishable from the case at bar in this, that Roberts killed the police officer in resisting an arrest for a misdemeanor, and it was held that unless the killing was done in malice and with deliberation, it was only manslaughter.

We perceive no error in the instructions given, nor in the action of the court in refusing those not given. The law of the case was placed before the jury in the most favorable light to the accused, and he has no right to complain. We deem it unnecessary to consider *seriatim* the instructions refused, as those that were given embraced the law applicable to the case. It is, however, contended that the court should have given instructions one and two which defined murder in the second

10. MURDER:  
manslaughter;  
instructions.



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degree. This is no case for such an instruction, or manslaughter in any of its degrees. Here, an officer of the law armed with legal authority goes in a quiet and peaceable manner, in company with Fisher, in whose employ defendant was at the time, and who was presumably the friend and not the enemy of the accused, to the shanty, in which defendant and others were, to discharge a public duty imposed on him by law. He proceeds, without hostile demonstrations, to inform defendant of the nature of his mission, by reading the warrant, and is shot to death like a wild beast, without the slightest provocation either by act or word. The killing of deceased was deliberately and willfully done. This is shown by the evidence of defendant himself, when he testified and said, "that he would not let a man get the drop on him." It also appears from the fact that, while deceased was reading or preparing to read the warrant, defendant drew his pistol and held it in his right hand behind him, thus evincing preparation to carry out the wicked purpose he meditated, and which he soon after put into fatal execution, by taking the life of a minister of the law, who was quietly and firmly undertaking to vindicate its majesty in the arrest of defendant charged with trampling it under foot. The language of Judge Agnew in *Brooks v. Commonwealth*, 61 Pa. St. 352, may not be inappropriately applied here: "The felon, conscious of his crime, has no just provocation; he knows his violation of law, and that duty demands his capture. Then passion is wickedness, and resistance crime. Neither reason nor law accords to him that sense of outrage which springs into a mind unconscious of offense, and makes it stand in defense of personal liberty."

There is nothing in the objection that deceased was not directed by his principal to execute the warrant when it was put in his hands. When he received it, his duty to execute was imposed by law, which he was bound to obey.

11. THE DUTIES OF  
A DEPUTY MAR-  
SHAL.

The objection, that the indictment was preferred by a

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grand jury of twelve, is answered in the case of the *State v. Dearing*, 65 Mo. 530.\* The law has been complied with in the trial, and the evidence fully sustains the conviction, and the judgment will therefore be affirmed, the other judges concurring, except Judge Hough, not sitting.

12. A GRAND JURY.

AFFIRMED.

### METZNER, Plaintiff in Error v. GRAHAM

#### Conflicting Executions: SHERIFF'S DUTY: MEASURE OF DAMAGES.

Although a sheriff having property in his possession by virtue of a writ of attachment from a court of competent jurisdiction, has no right before the determination of the attachment suit, to sell the property under an execution from a co-ordinate court, issued upon a judgment of foreclosure of a mortgage obtained by another party in a suit begun after the levy of the attachment, yet if he does sell in a case where the mortgage was recorded before the attachment was levied, and is for an amount greater than the value of the property, he will be liable to the attaching plaintiff in nominal damages at most.

*Error to Linn Court of Common Pleas.*—HON. THOMAS WHITAKER, Judge.

C. H. Mansur for plaintiff in error.

1. The defendant cannot avail himself in this cause of the defense that the mortgage given to Ewing was a valid one constituting a prior lien on the attached property; if he can, the mortgage and judgment of foreclosure cannot so inure to his benefit as to bring him within the line of decisions cited by his counsel, making him liable only for nominal damages. He was no party to the mortgage, has violated his duty, deprived plaintiff

\*The opinion filed in *Dearing's* case does not show that this point was decided. The reporter is, however, informed that it was made in the oral argument and was overruled on the spot.

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of his rights, and has caused a direct and positive loss. *Metzner v. Graham*, 57 Mo. 410, 411; Sedgwick on Dam., (5th Ed.,) p. 590

*H. M. Pollard* for defendant in error

In an action against an officer for neglect of duty, the measure of damage is the actual damage sustained by plaintiff by such breach, and, where plaintiff is not actually damaged, no more than nominal damages can be received. (1 Wag. Stat., § 64, p. 614.) Sedgwick on Dam., (5th Ed.,) pp. 27, 28, 43, §§ 49, 50, 53, 585-6-7-8, 593-4; Gwyne on Sheriffs, 573; 12 Met. 535; 2 Met. 490; 7 B. Mon. 298; 14 Ohio St. 187; 15 Ohio St. 523; *Berry v. Burckhardt*, 1 Mo. 418; *Miller v. Brown*, 3 Mo. 127; *Hickman v. Griffin*, 6 Mo. 37; *Davis v. Wood*, 7 Mo. 162; *Higdon v. Conway*, 12 Mo. 295; *State v. Ferguson*, 13 Mo. 166; *Mortland v. Smith*, 32 Mo. 225; *Bennett v. Vinyard*, 34 Mo. 216; *Howard v. Clark*, 43 Mo. 344; *State v. Powell*, 44 Mo. 436; *Pike v. Megoun*, 44 Mo. 498; *State v. Miller*, 48 Mo. 251; *Mayor v. Opel*, 49 Mo. 190; Herman on Executions, p. 625, § 408; *State v. Langdon*, 57 Mo. 350.

SHERWOOD, C. J.—Plaintiff's petition states that defendant was sheriff of Livingston county when the execution hereinafter described was issued; that in an action at law in the common pleas court of Livingston county, on April 22nd, 1871, wherein Herman Metzner was plaintiff, and one A. N. Smith was defendant, plaintiff recovered a judgment for \$1,127.33 and interest at 8 per cent. thereon and costs, and that in aid of said judgment, certain personal property, described in said petition, attached in said suit, and in the possession of defendant as the sheriff of said county, was ordered to be sold and the proceeds thereof applied in special payment of said judgment; and averring that said property was seized and levied upon on the 3rd day of January, 1871, by said sheriff, and was worth \$2,000, and was ample to pay said judgment; that after-

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ward, on June 3d, 1871, an execution on said judgment was put in defendant's hands as sheriff, and on the day it was issued; commanding him to sell the attached property as the property of said A. N. Smith, and commanding the proceeds thereof be applied in payment of said execution, and commanding that he should cause to be made the debt and damages and costs; and that he have the same before the court at the next term, being July 17th, 1871, to satisfy the same; that said July term has come and gone, and the defendant in violation of his duty has neglected and refused to make sale of said attached property, or to return said execution according to law and its command, and that he has become liable to plaintiff in the whole amount of money specified in said execution and for which he asks judgment.

Defendant, Graham, in his answer admits he was sheriff as stated; that judgment was rendered in the common pleas court, and the specific personal property set forth by plaintiff in his petition was ordered to be sold to pay said judgment and costs: "admits, he as the sheriff, had seized and held the same under and by virtue of a writ of attachment issued out of said court, that an execution issued on said judgment in favor of plaintiff and against Artemas N. Smith, of date June 3rd, 1871, directed to defendant Graham, as sheriff of Livingston county, and delivered to him the same day," by which he was commanded to sell said attached property as the property of said Smith, and to return said execution and proceeds to the common pleas court on June 17th, 1871, to satisfy said judgment and costs; that June 17th, 1871, has come and gone, and he has not sold said property as commanded; denies that he has not returned said writ of execution according to law; and denies he has become liable to plaintiff for the amount of said execution or any part of it. Defendant further alleges that a judgment was rendered in the circuit court of Livingston county, on February 16th, 1871, in favor of John A. Ewing and against said A. N. Smith, foreclosing

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a mortgage upon the aforesaid attached property for \$1,700 and costs; that an execution issued on said judgment on February 22nd, 1871, directed and delivered (same day) to said sheriff, (this defendant) commanding the sale of said personal property, and that defendant have the proceeds before the judge of the circuit court, on the 4th Monday in July, 1871, to satisfy said debt and costs of said Ewing; that at the time of its delivery, defendant held said property in his possession under and by virtue of the writ of attachment mentioned in plaintiff's petition; that on March 7th, 1871, under the Ewing execution he sold all the aforesaid attached personal property at public sale, for \$1,394.83, and paid off said Ewing execution as follows: To Ewing \$1,200, costs \$100.23, and said A. N. Smith as the head of a family claimed the remainder, \$94.58, as exempt, and the same was paid to him; denies the property was worth \$2,000; but admits it was worth \$1,394.58. Defendant alleges the mortgage from A. N. Smith to plaintiff was dated October 15th, 1870, and was filed for record in the proper office on the same day; that C. H. Mansur was attorney of plaintiff in said attachment suit of Herman Metzner, and had personal knowledge of the suit to foreclose the mortgage. Defendant alleges that at the July term 1871, of the common pleas court, he returned this plaintiff's execution setting forth the reasons why he had not sold under it as above stated, &c., &c., and alleges all the foregoing as an answer to plaintiff's petition.

Plaintiff for his reply, admits the suit upon the mortgage and judgment thereon in the circuit court of Livingston county, in favor of Ewing and against Smith: but avers that said suit was instituted on January 4th, 1871, and *after* the suit was commenced and the levy by attachment made, by defendant as sheriff in the suit wherein Metzner was plaintiff and Smith was defendant; admits an execution was issued on said judgment in favor of Ewing, and delivered to Graham, as sheriff, and that he as sheriff, sold said goods, in a manner and form, and for the



sum stated in the answer, and applied the proceeds in payment of the execution in favor of Ewing; but plaintiff denies that said judgment, execution and sale thereunder, was, or is, a defense either in law or equity to the cause of action stated by plaintiff in his petition, and denies that the return made by Graham, as sheriff, to said execution, was, or is any defense, either in law or equity to plaintiff's cause of action. Plaintiff for farther reply, says that the court of Common Pleas in and for Livingston county, was a court of record and had original jurisdiction with the circuit court, in all actions both at law and equity, and that no process issued in another suit in the circuit court to which plaintiff Metzner was not a party and had no notice, or day in court, could authorize or protect defendant in the seizure and sale of goods already in his possession and held by him by virtue of a writ of attachment issued out of the Common Pleas Court of Livingston county, in manner and form as alleged in plaintiff's petition. Plaintiff admits C. H. Mansur had personal knowledge of the pendency of the suit to foreclose the mortgage, but alleges that he became possessed of such knowledge as the attorney of A. N. Smith, and not as the attorney of plaintiff: by reason of which plaintiff avers that the answer of defendant sets up no defense and asks for judgment as prayed in his petition.

At the May term, 1875, of the Linn county Court of Common Pleas, where the foregoing cause was pending, it came on for hearing, and by agreement of parties was submitted to the court for trial, on the pleadings and their admissions, without the introduction of any testimony by either party. Whereupon, the court was asked by counsel for plaintiff to declare the law of the case, as follows:

1. It is admitted by the pleadings that plaintiff commenced a suit by attachment against one A. N. Smith, about January 2nd, 1871, in the Common Pleas Court of Livingston county, which suit he prosecuted to a final judgment April 22nd, 1871, for the sum of \$1,127.33, with

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interest thereafter at 6 per cent. (should have been 8 per cent.) and costs of suit; and that the attached property was ordered by said Common Pleas Court to be sold, to satisfy said judgment. It is also admitted by the pleadings, that defendant was at the time sheriff of Livingston county, and that he had seized as such sheriff, and held under the writ of attachment aforesaid, property of said Smith of the value of \$1,394.58. It is also admitted, that *after* the commencement of the aforesaid attachment suit, and *after* the levy therein, one Ewing commenced a suit to foreclose a mortgage, executed by said A. N. Smith, on the property attached as aforesaid, in the circuit court of Livingston county; that said mortgage suit was prosecuted to a final judgment on February 16th, 1871; that an execution issued on said judgment, and was delivered to defendant, Graham, as sheriff aforesaid, to sell the mortgaged property, and apply the proceeds to the payment of said execution; and it is further admitted that defendant, under the authority of said execution issued on the judgment foreclosing the mortgage, sold all the attached property for the sum of \$1,394.58 and applied the same in payment of said Ewing's execution, leaving a balance of 94.58 in his hands, which was claimed as exempt from execution by said A. N. Smith, as the head of a family, and which balance was, by the defendant, paid to said A. N. Smith. It is also admitted that an execution was issued and directed to the defendant, as sheriff aforesaid, on the judgment rendered in the attachment suit on June 3d, 1871, commanding him to sell the attached property, and to have the proceeds before the judge of said Common Pleas Court on July 17th, 1871, to satisfy said judgment, interest and costs. It is further admitted that said July 17th, 1871, has come and gone, and that defendant has not sold said attached property, or any part of it, under said execution, and that he has returned said execution not satisfied. It is also admitted that when the execution came into the hands of defendant as sheriff, issued in the mortgage suit,

he held attached property belonging to said A. N. Smith, under the writ of attachment issued in the suit of plaintiff against A. N. Smith, of the value of \$1,394.58.

2. That defendant, as sheriff of Livingston county, was not authorized or permitted by law, except at his peril, to decide between two rival claimants for attached property in his possession, and if he did so decide, and decided wrong, and in favor of the wrong party, he is responsible in damages at the suit of the injured party.

3. That if the defendant, as the sheriff of Livingston county, had and held in his possession, attached property of one A. N. Smith, sufficient to pay any part or all of the execution issued on June 3rd, 1871, by the common pleas court, to enforce its judgment rendered on April 22nd, 1871, in favor of plaintiff, and against said A. N. Smith, and that after defendant had levied upon and seized said attached property by virtue of process from said common pleas court, an execution from the circuit court was delivered to him as the sheriff aforesaid in favor of one Ewing, and against the said A. N. Smith, by virtue of which said last recited execution defendant proceeded to and did sell the aforesaid attached property, and applied the proceeds thereof in payment of said last recited execution, then the court must find for plaintiff in such sum as it may believe from the evidence the attached property was reasonably worth, not exceeding the amount of the judgment rendered in his favor in the common pleas court, with interest thereon at six per cent. (ought to be 8 per cent., see petition,) from April 22d, 1871.

To these declarations of law defendant objected to the 2d and 3d, and the court gave the 1st and 2d, and refused the 3d; and to its refusal to give the 3d, plaintiff excepted. The defendant then asked four declarations of law, the first three of which the court refused, and gave the fourth, which is as follows:

4. Should the court determine that plaintiff ought to recover, still, because the defendant is not damaged, the

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said goods being mortgaged for more than they were worth, and the mortgage duly recorded long prior to plaintiff's attachment in his suit against Smith, he can recover *only nominal* damages, or such as he may have sustained in fact; to the giving of which fourth instruction plaintiff objected, and saved his exceptions. The court then rendered judgment for plaintiff for one dollar and costs.

It was held when this cause was here before, (57 Mo. 404,) that the sheriff should not have sold the attached property under the special *fi. fa.* issued on the judgment of foreclosure, but should have held the property under the attachment, and certified to the circuit court the reason of his failure to sell under that execution. The property being in custody of the law, the officer clearly had no right to sell it under the process issued from another tribunal of concurrent jurisdiction—the jurisdiction of the Common Pleas Court having first attached. But the undenied allegations of the defendant's answer, do not show that the irregularity of the sheriff's action in the premises, has worked the plaintiff any substantial injury. The mortgage being of prior date to the attachment, and placed on record before the levy of the latter, the mortgagee occupied a superior attitude to the attaching creditor. So that, if the sheriff had, in doubt as to his duty, taken appropriate steps in the nature of a bill of interpleader, there can be no doubt, but that Ewing, the mortgagee, would have proved successful in the contest thus evoked. It cannot be that every mere technical breach of duty, or abstract remissness, unaccompanied by resulting injury, can form the basis for a substantial recovery, not at all proportionate to the actual damages sustained. Ewing, the mortgagee, having, as the answer shows, the better right to the mortgaged property, the plaintiff cannot be said, on the admitted facts, to have lost his debt through the negligence of the defendant. (1 W. S., p. 614, § 64.) It is unnecessary to say whether the ruling was correct which allowed the recovery of even nominal damages, since the defendant is

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Pope v. Thomson.

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not complaining. But holding, as we do, that the pleadings show facts, which, at any rate, must preclude the plaintiff of a larger recovery, we affirm the judgment. All concur.

AFFIRMED.

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POPE, *et al.*, Plaintiffs in Error v. THOMSON.

**Bill of Exceptions.** A bill of exceptions must be filed, in order to constitute a part of the record; and this must appear by an entry in the record proper; neither the indorsement of the clerk on the bill of exceptions, "filed," with day and date, nor the statement, by the judge that it is signed, sealed and made part of the record, nor both, will suffice, (*following Fulkerson v. Houts*, 55 Mo. 301, and other cases).

*Error to Morgan Circuit Court.*—HON. GEO. W. MILLER, Judge.

*Stover & Nelson* with *W. S. Pope* for plaintiffs in error.

*Draffen & Williams* for defendants in error.

HENRY, J.—The transcript contains no record proper, except portions incorporated in what purports to be a bill of exceptions. There is nothing to show that the bill of exceptions was ever filed. The court granted leave to plaintiff to file bill of exceptions within sixty days from the 5th of February, 1876, from which it is inferable that it was not filed in term, but when, or whether ever filed no where appears. It does not even appear that the clerk endorsed on the bill of exceptions, "filed." We do not mention this as an act that would authorize us to consider it as a bill of exceptions, but to show that this has less claim to be considered a bill of exceptions, than many of those which have been disregarded by this court. At the



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January term, 1874, two years before this cause was determined in the circuit court, in *Fulkerson v. Houts*, 55 Mo. 302, it was held that the bill "must not only be signed by the judge, but be filed also, during the term of the court at which it is taken." SHERWOOD, J., delivering the opinion of the court, says, also, that "the term 'filed,' as above employed, has a broader signification than the mere indorsement to that effect, and comprehends more especially in its proper interpretation, the entry made by the clerk on the record, by which the fact that it has been allowed is announced and appropriately evidenced." It must appear by an entry of record, in the record proper, that the bill of exceptions was filed. Neither the indorsement of the clerk on the bill of exceptions, "filed," with day and date, nor the statement by the judge that it is signed, sealed and made part of the record, nor both, will suffice. There must be a record entry that it was filed. The case of *Fulkerson v. Houts*, *supra*, has been followed in *Baker v. Loring*, 65, Mo. 527; *Johnson v. Hodges*, 65 Mo. 589, and *Clark v. Bullock*, 65 Mo. 535. Perceiving no error in that portion of the record, which is preserved, all concurring, the judgment is affirmed.

AFFIRMED.

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WARE V. JOHNSON *et al.*, Appellants.

1. **Sale under Execution:** SHERIFF'S POWER TO AMEND DEED. When a sheriff has executed a deed in pursuance of a sale under execution, conveying land by the same description by which it was advertised and sold, his power is at an end. He cannot afterwards execute another deed conveying by a different description the land which he intended to sell, and which the bidders at the sale understood was being sold.
2. **Deeds, Construction of:** CALLS FOR QUANTITY. In ascertaining the land that has been conveyed by a deed, a call for quantity will be rejected when inconsistent with the actual area of the premises as particularly described.

*Appeal from Nodaway Circuit Court.*—HON. HENRY S. KELLY,  
Judge.

*Johnson & Jackson for appellants.*

1. The sheriff was clothed with ample power to sell the land at the time of the sale at which Jones purchased; a valid execution had issued upon a regular judgment. *Buchanan v. Tracy*, 45 Mo. 437.

2. There is no such thing as a formal levy of an execution on real estate, as there is upon personal property; in the latter case it includes an actual seizure, while in the former our execution not being an extent, the levy begins with the sale. *Wood v. Colvin*, 5 Hill 230; *Draper v. Bryson*, 17 Mo. 71.

3. Where the sale is to a stranger there need be no notice of sale. If the judgment and execution be regular, a stranger to them will be protected in his purchase. *Curd v. Lackland*, 49 Mo. 451; *Draper v. Bryson*, 17 Mo. 71.

4. The sale of the land was by a description well known by all parties, and even better than had it been by a technical description, and no injury could result to the owner. And that being the case, the purchaser, Jones, was entitled to a sheriff's deed by the description under which it was sold, and if the sheriff made a mistake in describing the land he should have made another deed, and kept on making until the purchaser received a deed properly describing the land as "Hagey's Bend," or lot 2, section 30, township 65, range 37, Nodaway county. *Thornton v. Miskimmon*, 48 Mo. 219; *Ware v. Johnson*, 55 Mo. 500; *McPike v. Allman*, 53 Mo. 551. All the essential recitals were contained in the first sheriff's deed to Jones, except a proper description of the land. And we submit, that if the land was sold by a proper description, or by one well known so that the property sold could be intelligibly distinguished and identified, then Jones was entitled to a deed containing such proper description, and the sheriff

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should have made it to him, and when so made it would relate back to the time of sale, and cut out all intermediate purchasers with notice, such as plaintiff was proved to be. *Thornton v. Miskimmon*, 48 Mo. 219; *Harris v. Vinyard*, 42 Mo. 568; *Wilhite v. Wilhite*, 53 Mo. 71.

5. After Jones' purchase and payment of the purchase money nothing the sheriff could do or fail to do, could affect the validity of the sale, nor Jones' right to the land, and a proper deed therefor. He had no control over the sheriff after that and so far as he was concerned, the sheriff need make no return of the sale at all. *Buchanan v. Tracy*, 45 Mo. 437.

*John Edwards* for respondent.

The court below treated the amended deed of T. K. Beal, made March 22, 1875, as a nullity, for the reason that the levy, report and advertisement of sale of November 2, 1863, all contained the same description as that contained in the deed made in pursuance of such sale November 4, 1863. Beal, who made the sale and both deeds, testified that he procured the description, which he inserted in the amended deed, from the tax book, and from the surveyor and the old deed of November 4, 1863. The second deed, then, was no amendment, for the old deed correctly recited the levy, notice and report of sale as they actually occurred. The so-called deed was therefore a gross fraud, containing false recitals, and was made on an *ex parte* application of Beal, who was instigated by defendants, in so doing, to bolster up their defense in this action. Plaintiff had no notice of the proceeding and the amended deed should never have been made, *Scruggs v. Scruggs*, 46 Mo. 271. Such amended deeds cannot be made so as to work injustice to strangers. *Alexander v. Merry*, 9 Mo. 510; *Jackson v. Bard*, 4 Johns. 230; 2 Washburn on Real Prop., (2d Ed.) book 3, Cap. 4, Sec. 2, par. 46, p. 619. Amended sheriff's deeds are analogous to *nunc pro tunc* judgments;

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there must be some certain memoranda or basis, showing that the proposed amendments are in conformity to the facts; *Hovey v. Wait*, 17 Pick. 196; *Hyde v. Curling*, 10 Mo. 359.

NORTON, J.—This is a suit in ejectment, instituted in the Nodaway circuit court, for the recovery of lot 2, section 30, township 65, range 37, containing  $37\frac{11}{16}$  acres, in said county. Defendants in their answer admit that they were in possession of the land, but deny that such possession was wrongful. They allege that on the 29th day of April, 1861, one Robert R. Russell owned the land in question, and that on that day judgments were rendered against him in the circuit court of Nodaway county, upon which, executions were issued to the sheriff, who levied the same on said land; that said land was offered by him for sale at the November term, 1863, of said court, and was sold to one Jones for the price of \$10.25 per acre; that the sheriff in executing a deed to said Jones, defectively described the land so as to convey only one-fourth instead of the whole tract; that the plaintiff was present at said sale, and bid for said land; that the sheriff, who made the sale, executed in 1875, after his term of office expired, a second deed to Jones, correcting the mistake in the former deed, and conveying the whole of lot 2; that in 1865, Henry Jones conveyed the land to defendant, Elizabeth Johnson, by the same description as that contained in the deed first made by the sheriff. It was further alleged that the plaintiff, with full knowledge of defendant's right to the land, through the sheriff's sale to Jones purchased the same at sheriff's sale made in 1866, under an execution which issued on a judgment rendered against said Russell subsequently to those under which Jones bought. The new matter set up in the answer was denied by replication. The cause was tried by the court, and judgment rendered for plaintiff, for all the lands in dispute, except the  $n\frac{1}{2}$  of  $w\frac{1}{2}$  of lot 2, from which defendant has appealed. No in-

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structions were given, and no exceptions were made to the reception of evidence, and the error complained of is that the judgment was against the evidence. Both parties claim title under R. R. Russell who entered the land, and plaintiff, in support of his title, offered the plat book of original entries, showing that section 30, township 65, range 37, was divided into lots numbered from one to fifteen inclusive, lot 2 being one of them and containing 37 acres; also, the record of a deed executed by one Alexander, as sheriff of Nodaway county, by virtue of a sale made on the 12th of March, 1866, under an execution issued on a judgment against Russell, May 1, 1865. This deed described the land as lot 2 of ——— quarter, section 30, township 65, range 37, containing 37 acres. Defendants in support of their title offered a deed from T. K. Beal, sheriff of said county, dated 4th November, 1863, conveying to one Jones the  $n \frac{1}{2}$  of  $w \frac{1}{2}$  of lot 2 of  $s w \frac{1}{4}$  Sec. 30, T. 65, R. 37, by virtue of a sale made on the 2d of November, 1863, under two executions which issued on two judgments rendered against Russell on April 29th, 1861, and May 1st, 1861, respectively; also, another deed from said Beal after the expiration of his term of office to Jones, dated March 22nd, 1875. This second deed was in all respects the same as the first deed, except it described the land as lot 2, in Sec. 30, T. 65, R. 37, and was made, as shown by the evidence, to correct what was claimed to be a mistake in the description of the land as contained in the first deed. Defendants also offered other deeds showing that they had derived from Jones and his heirs all their title. Beal, the sheriff, testified that, when he made the sale in 1863, he intended to levy upon and sell the 37 acre tract, that it was in Sec. 30, T. 65, R. 37, that he did not remember the description, that it was bid off at \$10 per acre, that he sold the land by the description in the first deed to Jones, that the last deed made by him was to correct the mistake in the first one, that he got the description of the land as contained in the second deed from the surveyor,



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the tax books and the first deed, that he could not find the original execution. The evidence also showed that Ware, the plaintiff, attended the sale in 1863, at which Jones bought, for the purpose of buying lot 2, Sec. 30, T. 65, R. 37, and asked the sheriff if he was selling the land by the description in the advertisement, and upon being informed that he was, left without bidding. It also showed that, at the sale made in 1866 by Sheriff Alexander, at which plaintiff bought the land in question, defendants appeared, forbade the sale, and claimed the land under Jones' purchase made in 1863, that plaintiff looked at Beal's deed to Jones, and said that it did not convey the land then offered for sale by Alexander, that the land conveyed was in s w qr., and the land about to be sold was in n e qr. The plaintiff offered by way of rebuttal the original execution, levy and report of sale made by Beal in 1863, which showed the description of the land to be the "n  $\frac{1}{2}$  of w  $\frac{1}{2}$  of lot 2 of s w qr. Sec. 30, T. 65, R. 37, 37 acres." It was shown that the land was advertised by the same description, and by Beal himself, that he sold according to this description. The trial court in deciding the case must have disregarded the amended or second deed made to Jones in 1875, and treated it as a nullity, and the main and real question in the case is whether the sheriff, Beal, under the above facts shown in evidence could make such an amended or new deed.

A sheriff, who actually levies on a piece of land and sells the same, as levied upon, and by mistake misdescribes the land in his deed, may, under the supervision of the court from which the process issued, make a new deed, which will, as to parties and privies and all purchasers having notice, relate back to the time of the sale and pass the title from that date. *Ware v. Johnson et al.*, 55 Mo. 500. The object of such amendments is to make the deed conform to the real facts of the case, and there should always be something to amend by. *Hovey v. Wait*, 17 Pick. 196. In this case the sheriff who made the sale testifies that he

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sold the land by the description contained in the first deed made by him, and the execution under which he sold, with his levy and return endorsed thereon, shows that it was described as set forth in the deed, and the other evidence in the case shows that it was advertised by the same description, and was sold according to the advertisement. We cannot perceive how, in the face of these facts, the sheriff could make an amended deed to correct a mistake in the description in the first deed, for they clearly show that in the first deed the sheriff described the land as he had levied upon, advertised and actually sold it. To give force to such a deed and allow a sheriff to amend and contradict his levy, advertisement and report of sale, and convey in the amended deed land which he neither levied upon, advertised nor sold, would be laying down a rule whereby the property of debtors might be sacrificed and swept away. It is, however, insisted that at the sale it was understood by the bidders that the land was in "Hagey's bend," on Nodaway river, and that the sheriff so said, and that it was sold by the acre, as containing 37 acres, and this authorized the making of the amended or second deed. This we think can make no difference, as it clearly appears that the land was levied upon, advertised and sold by a description as particular as if it had been marked by boundaries describing each line and corner, and if with this particular description it was further described as being in "Hagey's bend," and containing 37 acres, the quantity would be rejected if inconsistent with the actual area of the premises particularly described. *Campbell v. Johnson*, 44 Mo. 248; *Hartt v. Rector*, 13 Mo. 497. With the concurrence of the other judges, the judgment will be affirmed.

AFFIRMED

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Sensenderfer v. Neale.

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SENSENDERFER, *Appellant*, v. NEALE.

1. **The Parol Evidence** tending to prove mistake on the part of the officers of the government in issuing a land patent, *Held* insufficient to overcome the record evidence submitted on the other side.
2. **Evidence: LAND SHARK.** It is error in an ejectment case to admit evidence that plaintiff is a "land shark."

*Appeal from Johnson Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

*Snoddy & Short and H. B. Johnson* for appellant.

*C. E. Moorman* for respondent

HENRY, J.—This was a suit in ejectment for the recovery of the e  $\frac{1}{2}$  of the se qr. and the s w qr. of the s e qr. of section No. 5, township No. 44, of range 24, lying in Johnson county. The plaintiff's title is a patent from the Government of the United States. Defendant alleges that he located land warrant No. 33,530 upon the land in question, but by mistake of the officers of the land office, other lands than these were certified as entered by him, and for these other lands, instead of those in controversy, the government issued to him a patent. The case, in many of its features, is similar to that of *Sensenderfer v. Smith*, (*ante* p. 80,) with this material difference, that by the act of Congress, under which defendant located said land warrant, he was required to make written application, specifying the land upon which he wished to lay his warrant. A copy of his original application was introduced as evidence, and was as follows: "I, Thomas Neale, of Benton county, State of Missouri, hereby locate e  $\frac{1}{2}$  and s w qr. of n e qr. of section 5, and n e qr. of the n e qr. of section No. 8, in township 44 of range 24, in the district of lands subject to sale at the land office at Clinton, Mo., containing 160 acres in satisfaction of the attached warrant numbered 33530. Witness my hand this 16th day of December, A. D. 1848

THOMAS NEALE.

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Attest: W. WATSON, Register; DAN'L. ASHLY, Receiver.

Defendant objected to the introduction of this copy, upon what ground, does not appear. It is certified to be a copy of the original then on file in his office, by Willis Drummond, commissioner of the general land office. To which was appended the following certificate:

LAND OFFICE, CLINTON, Mo., December 16th, 1848.

We hereby certify that the above location is correct, being in accordance with law and instructions.

DAN'L. ASHLY, Receiver.

W. WATSON, Register.

There was also appended the affidavit of defendant, stating "that there was not, at that time, an actual settlement and cultivation on any part of said land, and that there was no person or persons residing upon it." The patent issued to him by the government for the lands located with warrant No. 33530, was for the lands specified in defendant's application. When plaintiff entered the lands in question, there was nothing on the records of the land office showing that they had been entered. Neale, the defendant, testified that the land in question, was not enclosed or adjoining any of his enclosed land. He paid taxes on it, but never had actual possession of it. He further testified that the duplicate he received, corresponded with his application. The parol evidence tended to show that Neale had located his warrant upon the land in controversy, but it is not strong enough, nor can we conceive of parol evidence that would be sufficient to overcome the record evidence, and the defendant's own written application and affidavit to locate his warrant upon the very land for which the patent was issued to him.

The court admitted evidence to show that plaintiff was a "land shark," but that was wholly irrelevant and incompetent. The lands of the government are for sale to any one who wishes to purchase, and millions of acres of the

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public domain have been entered by speculators. The land, as far as the records of the land office showed, were vacant, and whether a "land shark" or not, plaintiff had the same legal right to enter them for speculation as if he had entered them to settle upon and improve them. The judgment is reversed and the cause remanded, to be proceeded with in conformity to this opinion. All concur.

REVERSED.

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CROCKETT *et al.*, Plaintiffs in Error, v. LEWIS.

**Final Judgment.** A judgment for costs with an order of execution, but without other disposition of the case, is not a final judgment, and no writ of error lies from it, (*following Boggess v. Cox*, 48 Mo. 278).

*Error to Putnam Circuit Court.*—HON. JOHN W. HENRY,  
Judge

A. W. Mullins with A. J. Hoskinson for plaintiffs in error.

C. L. Dobson for defendant in error.

NORTON, J.—The record in this case shows no final judgment from which a writ of error can be prosecuted. It shows that the jury retired, and after a short time returned into court their verdict as follows: "Non Suit." "It is therefore considered by the court that the defendant do have and recover against the plaintiffs his costs in this suit laid out and expended, and that he have thereof execution." The writ of error will, with the concurrence of the other judges, therefore be dismissed under the authority of *Boggess v. Cox*, 48 Mo. 278.

DISMISSED.



HANCOCK V. WHYBARK *et al.*, Plaintiffs in Error.

1. **Evidence:** THE RECITALS IN A TRUSTEE'S DEED purporting to be executed in pursuance of a power of sale given by a deed of trust, are of themselves, no evidence of the facts stated, unless made so by express provision of the deed of trust, (*following Neilson v. Chariton Co.*, 60 Mo. 386; *Vail v. Jacobs*, 62 Mo. 130).
2. ———: TRUSTEE'S AFFIDAVIT OF NOTICE: ADVERTISEMENT. The affidavit of a trustee in a deed of trust showing compliance with a requirement of the deed that he should give notice of sale by posting an advertisement in ten public places before proceeding to sell under it, is not admissible in evidence as a publisher's affidavit within the meaning of section 7. p. 125, Wag. Stat. He must be introduced as a witness to prove the fact.
3. **Deed of Trust:** EVIDENCE: ESTOPPEL. Evidence showing that the power of sale was extinguished by payment of the debt, before the sale under the deed of trust, is admissible where the purchaser at such sale is the *cestui que trust*, and is seeking to recover possession of the property purchased from the grantor in the deed of trust. But, evidence of facts constituting an estoppel against the grantor from setting up such a defense, is also admissible.
4. **Deed of Trust:** EVIDENCE is admissible to show that a portion of the property seized by the sheriff, under a writ of replevin, as appurtenant to certain personal property conveyed by a deed of trust, was not a part thereof when the deed was executed, and was not included therein. Whether it passed as after acquired property is a question of law for the court on the facts proven.

*Error to Wayne Circuit Court.*—HON. R. P. OWEN, Judge.

*Henry Flanagan and B. Zwart for plaintiffs in error.*

1. This is a direct action between the parties to the deed of trust for the possession and determination of title to the very property claimed to be conveyed thereby, before the property had been demanded or had gone out of the defendant's possession. It was competent to prove payment of the debt, and consequent extinguishment of the power to sell. The fact that a large portion of the property was not covered by the deed of trust, or any other fact tending to disprove plaintiff's title, ownership or right to the possession of the property taken, was competent.

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1 Hill on Mort., (4 Ed.) p. 593, § 23; p. 147, § 24; *Greenway v. James*, 34 Mo. 326; *Weston v. Clark*, 37 Mo. 568; *Gray v. Parker*, 38 Mo. 160; *Cameron v. Irwin*, 5 Hill 272, 275; Chitty on Cont., (10 Am. Ed.) 399, 400; 2 Hill on Mort., p. 379.

2. The execution of the trustee's deed and the notice of sale was not proven.

*J. W. Emerson* and *J. P. Dillingham* for defendants in error.

The trustee's deed was sufficient, and conclusive evidence of title, and could not be attacked collaterally. The proceeding should have been in equity to set aside the sale. Until that is done, the sale and deed must stand. *Haeusler v. Mo. Glass Co.*, 52 Mo. 453; 2 Starkie Ev., p. 544; 2 Bibb, 311, 321; *Pilkington v. Trigg*, 28 Mo. 99.

HOUGH, J.—This was an action brought in the circuit court of Wayne county, under the statute in relation to the claim and delivery of personal property, for the recovery of "one circular saw mill, one steam engine, one steam boiler, and the necessary running apparatus thereto belonging." On the 11th day of April, 1872, the defendants executed a deed of trust, whereby they conveyed the property sued for to one B. F. Carter, as trustee, to secure the payment of certain obligations made by them to the plaintiff. On the 22d day of July, 1872, the trustee, assuming to act under the power conferred upon him by the trust deed, sold said property to the plaintiff at public sale, and executed to him a bill of sale, or rather a formal deed, therefor. The sale took place at the court-house door in Centreville, Reynolds county, the place appointed in the deed, but the property was not present at the sale, and was not actually delivered to the plaintiff. The defendants having refused to surrender the same, plaintiff instituted the present action. At the trial plaintiff offered in

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evidence the deed of trust, the trustee's deed to him, reciting the trust deed, the default, the notice of sale, sale and purchase by plaintiff, and the affidavit of the trustee, that he had posted ten copies of the notice of sale, in ten public places, as required by the deed of trust, all of which were admitted against the objections of the defendants, that the execution of the deeds was not proven, and that the affidavit of the trustee was incompetent.

The only evidence of a sale and purchase by the plaintiff, was the instrument in form of a deed, made to him by the trustee. There was no proof of its execution, nor was there any evidence of the truth of the recitals it contained; nor were the recitals themselves made *prima facie* evidence of their truth by the provisions of the deed of trust. This instrument was, therefore, improperly admitted in evidence. *Neilson v. The County of Chariton*, 60 Mo. 386; *Vail v. Jacobs*, 62 Mo. 130.

Nor was the affidavit of the trustee competent evidence. He should have been introduced as a witness. Section 7 of the statute in relation to advertisements, is inapplicable to a case like the present.

The defendants offered to prove that the deed of trust under which the plaintiff claimed, was satisfied and extinguished by the payment of the debt there-  
by secured to be paid, before the sale made by the trustee thereunder; but the court rejected the testimony holding, as declared in one of the instructions, "that the sale of personal property by a trustee under a deed duly executed and regular upon its face, cannot be attacked in a collateral proceeding, and can only be attacked by the grantor in the deed of trust, or those claiming under him by a direct proceeding to set the same aside." Testimony showing that the power of sale conferred upon the trustee had been extinguished by payment of the debt, is undoubtedly admissible in a case like the present, as the

1. EVIDENCE: the recitals in trustee's deed.

2. ———: trustee's affidavit of notice: advertisement.

3. DEED OF TRUST: evidence: estoppel.

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counsel for the plaintiff now concedes ; but he insists that the defendants were, by their conduct at the sale, estopped to make such proof. As all the testimony showing what transpired at the sale was excluded by the court, the plaintiff cannot rely upon it in this court as constituting an estoppel. Evidence of the payment of the debt, and of the facts constituting the estoppel, if any such existed, should have been admitted by the court.

The defendants should also have been permitted to show, if they could, that part of the property seized by the sheriff as appurtenant to the engine and machinery of the mill, was not a part thereof when the trust deed was executed, and was not included therein. Whether it passed as after acquired property, was a question of law for the court on the facts proven. For the errors above indicated, the judgment of the circuit court will be reversed and the cause remanded. The other judges concur.

REVERSED.

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AMERICAN UNION EXPRESS Co., *Appellant* v. CITY OF ST. JOSEPH.

1. **Taxation:** SECTION 30, ART. 1, CONSTITUTION OF 1865, which provided that "all property subject to taxation ought to be taxed in proportion to its value," while it enjoined a uniform rule in imposing taxes on property, did not abridge the power of the Legislature to provide revenue from other sources, (*following Glasgow v. Rowse*, 43 Mo. 479).
2. **Municipal Powers of Taxation:** UNIFORMITY AND EQUALITY. A city which is authorized by its charter to license, tax and regulate merchants, agents, express companies, insurance companies, &c., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city, and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike.

3. **State Taxation on Receipts of Express Companies,** NO INFRINGMENT ON POWER OF CONGRESS TO REGULATE COMMERCE. A tax levied by State authority upon the gross receipts of an express company, whose business consists in receiving goods to be delivered at points outside of the State, to which the company's line does not extend, is not a violation of that provision of the constitution of the United States which confides to Congress alone the power to regulate commerce with foreign nations and among the several States, (*following Erie R. R. Co. v. Pennsylvania*, 15 Wall. 284).

4. **Municipal Tax on Express Companies:** ESTOPPEL A tax imposed by city ordinance upon the gross receipts of an express company as a compensation for the transaction of its business in the city, is properly collected from the gross earnings without deduction for expenses incurred in conducting the business.

If a part of the gross receipts have been paid out to other companies as their *pro rata* for carrying freight, although in strictness the amounts so paid may not be liable to taxation under the ordinance, yet when they are embraced in the return made by the company itself, and the tax has been paid on the whole, though under protest, it cannot be recovered back.

*Appeal from Buchanan Circuit Court.*—HON. JOS. P. GRUBB, Judge.

*Allen H. Vories* for appellant.

1. The defendant, under its charter and ordinances, had no constitutional power under the same ordinance to provide one mode of taxation for merchants and an entirely different one for express companies, when the power to "license, tax, &c.," is contained in the same section.

2. Defendant had no power to license plaintiff's business and tax it for revenue purposes, especially in the same ordinance. The power to license, regulate and tax, as contained in defendant's charter, cannot be construed into a power to issue license to plaintiff for permission to carry on its business, and also to tax it for revenue purposes, as was done by defendant, using both means. 1 Dillon on Mun. Corp. §§ 291, 292, 293; 2 Ib. §§ 606 to 610; Cooley on Taxation, 408 to 413.

3. The tax, as assessed, was illegal, as but fifteen per



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cent. of the amount received, was received by plaintiff as a compensation in said city for the transaction of such express business, and the remainder passed through plaintiff's hands, in the way of paying back charges to other express companies, and advancing money to pay on freight carried by other companies outside of the State.

4. It is admitted that defendant could have passed an ordinance taxing the avocation of plaintiff as an express company; but it is denied that it had the power to impose a license, and then, by way of taxing its business, raise a revenue of two per cent. on \$11,548.70, when, if plaintiff's \$1,200 worth of property had been taxed, it would have received as revenue from plaintiff, twenty-four dollars instead of \$230. The merchant pays taxes upon his property on hand once a year, but plaintiff pays upon the amount of money coming into its hands during the entire year. Hence the ordinance operates as a prohibition, is unjust and unequal.

5. The plaintiff is a foreign corporation, its stock owned in New York, engaged in transporting freight across the State of Missouri from California to New York. Now, if the defendant, or the State of Missouri, attempt to impose and collect a tax upon the gross amount of freight receipts received by plaintiff in St. Joseph for freight so transported across our state, the plaintiff being merely one of the connecting lines, it would clearly be unconstitutional and void. *State Freight Tax Case*, 15 Wallace 232.

*Benjamin R. Vineyard* for respondent.

1. The charter of defendant gave the mayor and city council power to license, tax and regulate express companies or their agencies, and in pursuance of that power and authority the ordinance complained of was passed; and the objections, on the ground of unconstitutionality are not well taken. *Washington v. State*, 13 Ark. 752;

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*Zanesville v. Richards*, 5 Ohio (N. S.) 589, 593; *Baker v. Cincinnati*, 11 Ohio (N. S.) 534, 541; 2 Dillon Mun. Corp. (2 Ed.) p. 692, § 593; *Fire Depart. Milwaukee v. Helfenstein*, 16 Wis. 136; *U. S. Ex. Co. v. Ellyson*, 28 Iowa 370; *Simmons v. State*, 12 Mo. 268; *St. Louis v. Laughlin*, 49 Mo. 562; *Glasgow v. Rowse*, 43 Mo. 489; *Erie R. R. Co. v. Pennsylvania*, 15 Wallace 284.

NORTON, J.—This suit was instituted in the circuit court of Buchanan county to recover back a part of the taxes paid by plaintiff for the years 1872 and 1873. It is alleged that the taxes were paid by plaintiff under protest, and because defendant, through its collector, threatened to seize and sell the property of the plaintiff to pay the same. The petition alleges that, during the years 1872 and 1873, the plaintiff only had at any one time \$2,500 worth of property, and yet plaintiff's taxes for the year 1872, as assessed, amounted to \$180.97, and for the year 1873, to \$206.75, although the tax levy was only two per cent. It is alleged that this tax was illegally assessed, under an ordinance of said city requiring express companies to pay an *ad valorem* tax equal to that which is levied upon real estate within the limits of said city, for general and special purposes, upon the gross amount of all moneys which, during the year ending on the first day of January, shall have been received by such company, as a compensation for the transaction of such express business; that under said ordinance plaintiff was required, on the first day of January of each year, to take out a license, and to pay therefor, the amount assessed under said ordinance as an *ad valorem* tax; that, in consequence thereof, plaintiff has been forced to pay more than its due share of the municipal taxes for the years 1872 and 1873, and asks judgment for the recovery of the taxes so paid. The answer contained a denial of each and every allegation of the petition. Upon the trial, after the introduction of plaintiff's evidence, the court instructed the jury that on the evidence

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plaintiff was not entitled to recover. Whereupon a nonsuit was taken, with leave, and a motion to set the same aside, and for new trial being overruled, the plaintiff brings the case here by appeal. On the trial plaintiff offered in evidence, a provision from defendant's charter, empowering it "to license, tax and regulate wholesale merchants, agents, express companies or their agencies, insurance companies or their agencies, telegraph companies or their agencies, land agents and real estate brokers," also, an ordinance entitled "merchants," to the effect that merchants shall, on the first day of January of each year, take out a license and pay an *ad valorem* tax, equal to that which is annually levied upon real estate within the limits of the city, on the actual cash value of all goods, wares and merchandize which they may have in their possession or under their control, whether owned or consigned to them for sale, on the first day of January in each year; also, another ordinance, entitled "express companies," to the effect "that every express company or agency thereof, doing an express business in the city, shall pay an *ad valorem* tax equal to that which is levied upon real estate within the limits of the city, for general and special purposes, upon the gross amount of all moneys which, during the year ending on the first day of January, shall have been received by such company or agency in said city, as a compensation for the transaction of such express business." Other evidence was introduced, showing that the city collector had the authority to seize and sell property after demand and refusal to pay the tax; also, evidence tending to show that plaintiff had paid the tax in question under protest, after its payment had been demanded by the collector.

It is argued by counsel for plaintiff that the court erred in giving the instruction that, under the evidence, plaintiff could not recover, because defendant, by virtue of the authority given in the charter, had no constitutional power to provide one mode of taxation for merchants and

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another and different mode for express companies, and because the evidence showed that the tax was involuntarily paid.

We entertain no doubt of the right of the Legislature to delegate the power to tax. This does not seem to be disputed, but it is contended that defendant in exercising the power so exercised it as to conflict with the provision of the constitution then in force, "that all property subject to taxation ought to be taxed in proportion to its value." The question here presented was considered in the case of *Glasgow v. Rowse*, 43 Mo. 479, which involved the constitutionality of an act of the Legislature imposing a tax on incomes, and it was held that such an act was not in conflict with the above constitutional requirement; and that the mandate that taxes on all property shall be in proportion to its value, does not include every species of taxation, that while it enjoins a uniform rule in imposing taxes on property, it does not abridge the power of the Legislature to provide revenue from other sources. It has also been held that the power of the Legislature to tax all professions, is unquestioned, and the State might delegate the authority, but it should be done in clear and unmistakable terms. *St. Louis v. Laughlin*, 49 Mo. 559; *Simmons v. State*, 12 Mo. 268.

In defendant's charter the power to tax as well as to license and regulate express companies or their agencies, is in plain terms conferred by the Legislature. It may be conceded that if it appeared that the power conferred was simply to license and regulate the occupation or pursuit of express companies, it would not authorize the levying of a tax on the occupation unless it clearly appeared that such was the legislative intent in conferring it. 1 Dill. 292. But here the power to tax is expressly given, and hence the argument of counsel does not apply. In exercising the power thus delegated, the city council might adopt any method of taxation which the Legislature might have adopted, and as it has

1. TAXATION: section 30, art. 1, constitution of 1865.

4. MUNICIPAL POWER OF TAXATION: uniformity and equality.

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been expressly decided that the Legislature might impose a tax upon incomes, it follows that the defendant, through its council, might, as it in fact did, impose a tax on the income of defendant, the gross receipts being in effect the gross income. It is argued that the tax complained of is illegal, because under the ordinance express companies are taxed in a different manner from merchants. We do not perceive the force of the reasoning. The city council in exercising the power to tax the various classes of pursuits mentioned in the ordinance, could not well apply the same rule to all of them, nor do we think it was the purpose of the Legislature to require them to do so. If, however, the defendant in its ordinance, had provided one mode of taxing one express company, and another and different mode for another company engaged in the same business, such ordinance would have been open to the objection urged as destroying equality and uniformity. A provision in the constitution of Louisiana declaring that all taxation "shall be equal and uniform throughout the State," even if it extends to municipal taxation, is not violated by a legislative provision authorizing the taxation by municipalities of callings, trades and professions, exercised within their limits; and taxation of this kind is equal and uniform, if all persons engaged in the same business are taxed alike. 2 Dill. Mu. Cor. § 593.

But, it is said that, as the business of plaintiff consisted in receiving packages to be transported from St. Joseph to other points outside of the state, to which plaintiff's line did not extend, the tax upon the gross receipts of plaintiff was violative of that provision of the constitution of the United States confiding to Congress alone the power to regulate commerce with foreign nations and among the several states. In the case of *Erie Railroad Company v. Pennsylvania*, 15 Wall. 284, it was expressly held that a statute of a state imposing a tax upon the gross receipts of railroad companies is not repugnant to

3. STATE TAXATION  
ON RECEIPTS OF  
EXPRESS COMPAN-  
IES, no infringe-  
ment on power of  
congress to regu-  
late commerce.



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the constitution, though the gross receipts are made up in part from freights received for transportation from that state to another state; that such a tax is neither a regulation of inter-state commerce, nor a tax on imports nor exports, nor upon inter-state transportation.

It is also argued that the tax was illegal, because the gross receipts upon which it was paid were not received by plaintiff "as a compensation for the trans-  
4. MUNICIPAL TAX ON EXPRESS COMPANIES; estoppel. action of such express business in the city of St. Joseph." This objection is based on the evidence of one Worden, who was the general agent of plaintiff, who testified that he could not certainly distinguish how much was paid to other companies, but did not believe that the net earnings of the plaintiff for the year 1872 exceeded fifteen per cent. of the gross amount, and that out of this latter amount received for the year 1872, a part was paid out to other express companies, *pro rata*, for carrying freight, a part for the hire of hands and in other general expenses in running their business, and in feeding and taking care of its stock. This witness also testifies that he made the quarterly report for the company on the 1st of January, 1873. Now, according to this report made by the plaintiff, the gross receipts amounted to the sum of \$11,548.70 for the year 1872, and the tax was collected on the data furnished by plaintiff, and it matters not that the witness testified that the net earnings amounted only to fifteen per cent. of the gross earnings, the balance being consumed in expenses, etc. It was the gross earnings which was the subject of the tax, and they were received as compensation for the transaction of express business, although a considerable part thereof may have been consumed in expenses incurred in conducting it. If even in strictness, the amounts paid to other companies *pro rata*, for transportation out of the state, should have been deducted from the gross receipts of plaintiff, it should have been done by the company when required under oath to

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Elliott v. Hannibal & St. Joseph R. R. Co.

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make a statement on the first day of January, as to the gross receipts for the business of the previous year.

Under the views above expressed, it is wholly immaterial whether the payment of the tax sought to be recovered back was voluntary or involuntary. Assuming the payment to have been made involuntarily, still the plaintiff could not recover unless the tax was illegal and unauthorized, and, as we perceive no illegality in the tax, either for want of power in the city council to impose it, or in the manner in which it was imposed, the judgment will be affirmed, with the concurrence of the other judges.

AFFIRMED.

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ELLIOTT V. HANNIBAL & ST. JOSEPH RAILROAD COMPANY,  
*Appellant.*

1. **Railroads:** STATUTORY LIABILITY OF, FOR INJURIES TO ANIMALS. No action can be maintained, under the 43rd section of the railroad law (Wag., Stat., p. 310), for animals killed within the limits of a town or city; in such cases, where fences have not been, but might lawfully be erected, the action should be brought under section 5 of the damage act (Wag. Stat., p. 520), which dispenses with the proof of negligence, or, the action should be brought at common law.
2. ———: **FENCES.** Where, within the limits of a town or city, lands dedicated to public use, and crossing or abutting upon the right of way of a railroad company, are occupied and used for farming purposes, such occupancy does not make it lawful for the railroad company to fence across them, and its failure to do so will not subject it to liability under the 5th section of the damage act.

*Appeal from Marion Circuit Court.*—HON. JOHN T. REDD,  
Judge.

*James Carr and H. B. Leach* for appellant.

HOUGH, J.—This was an action brought under the 43rd section of the act in relation to railroad companies to re-

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cover double the value of two mules killed by the trains of the defendant, near its depot, within the town plat of the town of Ely, in Marion county. We held in the case of *Edwards v. Hann. & St. Joe. R. R. Co.*, ante p. 567, that no action can be maintained under the 43rd section of the railroad law for animals killed within the limits of a town or city. When animals are killed in towns and cities where fences have not been, but might lawfully be erected, the action should be brought under the 5th section of the damage act, which in all such cases dispenses with the proof of negligence. We do not mean to say that on the facts disclosed in the present record, an action could be successfully maintained under the last mentioned section; on that point we need not now express any opinion. We only mean to say that if plaintiff has any right of action, it is under that section or at common law.

It may not be inappropriate to remark, in this connection, that where, within the limits of a town or city, the original proprietor, or other person, shall take possession of and use for farming purposes lands dedicated to public use, which cross or abut upon the right of way of a railroad company, such occupancy will not make it lawful for the railroad company to fence such dedicated lands, and the absence of fences in such cases will not dispense with proof of negligence. Following the case above cited, the judgment in this case must be reversed and the cause remanded. The other judges concur.

REVERSED.

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THE STATE V. DAVIS, *Appellant.*

**Practice, Criminal:** JURY: WAIVER OF FULL PANEL. A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether

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he may waive his right of his own motion, and without suggestion from the other side, *quaere?*

*Appeal from Jackson Criminal Court*—HON. HENRY P. WHITE,  
Judge.

*B. L. Woodson and Rucker Bros.* for appellant.

1. Defendant could not waive the legal number of jurors in the manner shown by the record. *Berry v. State*, 10 Ga. 524; *Terry v. Buffington*, 11 Ga. 337; *King v. Woolf*, 1 Chitty 401; *State v. Mansfield*, 41 Mo. 470; *State v. Klinger*, 46 Mo. 224; *Brownlee v. Hewitt*, 1 Mo. Appeal Rep. 360.

*J. L. Smith*, Attorney-General, for the State.

1. The defendant consented to a panel of 24 men, and 9 challenges, and thereby waived his privilege of striking off the statutory number. Being for his benefit, he could waive the privilege, and cannot take advantage of his waiver after the verdict. It is not alleged nor proved that he was in any wise prejudiced thereby, and, if he were, the matter was not presented in time nor in the proper shape. *State v. Marshall*, 36 Mo. 400; *State v. Hays*, 23 Mo. 287; *State v. Holme*, 54 Mo. 153; *State v. Jackson*, 12 La. An. 679; *State v. Vester*, 23 La. An. 620; *State v. Axiom*, 23 La. An. 621; *People v. Coffman*, 24 Cal. 230; Proffatt on Jury Trials, § 198.

SHERWOOD C. J.—Defendant was indicted for robbery in the first degree, convicted, and his punishment assessed at the lowest statutory limit.

I. When the defendant was arraigned, there were but 24 of the regular panel of jurors in the box; seeing this, the court ordered the marshal to summon six additional ones, whereupon the prosecuting attorney asked the attorneys of defendant to waive the bringing in and swearing of the six additional ones, which defendant's attor-

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neys consented to do. Thereupon the prosecuting attorney struck off three men, and the defendant's attorneys nine men, and the remaining twelve were sworn as a jury. In indictments for the offense charged, the accused is entitled to a panel of 30 jurors. It is provided: There shall be summoned and returned in every criminal cause, a number of qualified jurors equal to the number of peremptory challenges, and twelve in addition; and no party shall be required to make peremptory challenges before a panel of such number of competent jurors shall be obtained. (2 W. S., 1102, § 7.)

The minimum of punishment for robbery in the first degree, is ten years; (1 W. S., 456, § 23); and as "no limit to the duration of such imprisonment is declared, the defendant was entitled to twelve peremptory challenges, (2 Id., 1102, § 4), and the State to six, (Id., § 6). The court should have enforced the order for summoning six additional jurors, and promptly rebuked the prosecuting attorney when making his improper proposal to the opposing counsel. When one indicted for a felony appears for his trial, he comes into the court room bearing the stigma of an indictment, every eye is fixed on him with scrutinizing suspicion; he is decidedly below par, carries weight, and "is under a cloud." Though technically free and presumptively innocent, the beneficent presumptions of the law avail him but little; morally he is in chains. He is, therefore, in no condition to object to scarcely anything which the prosecuting attorney may propose, without incurring the hazard of increasing the suspicion which already clusters around him, and thus fatally prejudicing his cause. The very term waiver imports a voluntary act, and an act cannot be thus denominated when performed under conditions of practical compulsion. If the accused fails to object to an improper proposal coming from the representative of the State, he thereby loses a right guaranteed to him by the law. If he objects, he thereby jeopardizes his right to an impartial trial by jury, guaranteed to



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him by the constitution. Under such circumstances, to hold the prisoner bound by an involuntary, so-called, and extorted consent, would be purely farcical, and the merest mockery of justice. We do not by the above remarks, intend to be understood as meaning that the accused may not voluntarily, and of his own head, waive any right, short of a constitutional one; but we do mean to assert that such waiver must be one in deed and in truth; in reality, not alone in name and appearance; not made as the result of what is in effect, an intimidatory suggestion of the prosecuting attorney. (*Brownlee v. Hewitt*, 1 Mo. App. Rep. 360; *Terry v. Buffington*, 11 Ga. 337.) In *State v. Hays*, (23 Mo. 287), there was a full panel upon which the right of peremptory challenges could be exercised. In the *State v. Holme*, (54 Mo. 153), the judgment was reversed, because of non-compliance with the statute requiring that the first twelve names remaining on the list should be recorded. Two of such names were not thus recorded, and the error was held fatal. It is true objection was made at the time, but the opinion seems to be based, for the most part, on the clear and needless violation of a plain statutory provision. In the *State v. Mansfield*, (41 Mo. 470), it was said, when speaking in general of the right of the accused, "that the prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him;" and the remarks of Abbott, C. J., in *King v. Woolf*, (1 Chit. 401), are cited with approval, as to the evident impropriety of the prosecuting officer making a request of the defendant to which he cannot fail to accede without injuriously affecting him. If in the case at bar, we give sanction to a course of conduct which deprives the defendant of three peremptory challenges, because the prosecuting attorney suggests it, the same principle pushed to its logical conclusion, would, upon a like suggestion, deprive him of all peremptory challenges. The statute is very plain and of very easy observance, and the administration of public justice will be best subserved by compel-

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ling prosecuting officers to keep within the line of their legitimate duty. This is only one of numerous instances, where the Attorney-General is called upon to perform the onerous task of offering argument in attempted justification of the acts of his subordinates. All necessity for this, as well as the large accumulation of criminal costs which it entails upon the State, can be readily obviated by simply observing that which the statute enjoins; that and nothing more. And the sooner this is understood by those who in the lower courts represent the State, the better will it be for her financial welfare. Under the old circuit attorney system, these departures from statutory provisions, were by no means frequent; now, however, under the new regime, they are so common as to fail to excite comment.

II. The instructions, both on the part of the State as well as those on behalf of defendant, seem to leave nothing to be desired; and the seventh instruction asked by the latter was properly refused, inasmuch as it was a mere commentary upon the evidence.

III. We think that Ghio, the saloon keeper, should have been permitted to testify respecting the condition of Wittak, when in his saloon. His condition at that time, as respects drunkenness, would have some tendency, though slight, to shed some light upon subsequent occurrences, and enable the jury to form a more accurate opinion of the reliability to be given to his testimony. As the cause must be retried because of the first mentioned error, we forbear further comment on the evidence, reverse the judgment and remand the cause. All concur.

REVERSED.

# INDEX.

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## ACCOUNT.

**LIMITATION AGAINST RUNNING ACCOUNT.** When it is fairly inferable from the conduct of the parties to a running account while it is accruing, that the whole is to be regarded as one account, none of the items are barred by the statute of limitations, unless all are (*following Madison Coal Co. v. Steamboat Colona*, 36 Mo. 446 and other cases); *Ring v. Jamison, Admr.*, 424.

SEE EQUITY,

## ACTION.

1. **STATUTE OF FRAUDS.** No action can be maintained to recover back money or property, which has been paid upon a verbal contract for the purchase of land, if the vendor is willing to execute the contract on his part. *Galway v. Shields*, 313.
2. **CASE ADJUDGED.** In an action for the value of goods sold and delivered, no recovery can be had, if it appears that such goods were delivered pursuant to a verbal agreement that the price therefor was to be paid in specific land to be conveyed by the buyer to the seller, and the buyer has offered and is ready and willing to comply with his part of the agreement. *Ib.*

SEE DAMAGES, 1.

## ADMINISTRATION.

1. **DEVISEE AND EXECUTOR: EJECTMENT.** Under the administration act, (Wag. Stat., 89, §§ 48, 49,) a devisee of real estate cannot maintain ejectment against one holding under a lease made by the executor of the deviser in obedience to an order of the probate court. The act expressly authorizes the executor to lease the real estate of his decedent, when so directed by competent authority, and the right of the devisee is subordinate to this. *Eoff v. Thompson*, 225.
2. **SUBROGATION: RIGHTS OF SURETIES ON AN ADMINISTRATOR'S BOND WHO HAVE PAID DEBTS OF THE ESTATE.** An administrator having failed to collect and pay over the purchase money of land sold by him to pay a debt which had been allowed against the estate of his decedent, was sued by the creditor on his bond, and his sureties

were compelled to pay the debt. In a suit by the sureties to have the administrator's deed to the land set aside as fraudulent and themselves subrogated to the rights of the creditor, and for general relief, the deed was set aside, and it was *Held*, 1st, That they were entitled to have the benefit of the creditor's allowance, and that the proper mode of enforcing their right was to procure an order of the probate court for the sale of the real estate of the deceased to satisfy that allowance; 2nd, That they were not entitled to have the probate court allow as a claim against the estate of the deceased a judgment which they had obtained against the administrator for the amount of the debt paid by them, together with costs and expenses incurred in resisting payment. *Werneck v. Kenyon's Admr.*, 275.

3. PROBATE JURISDICTION: STATUTE CONSTRUED. In a county in which a probate court is established, having by statute exclusive original jurisdiction "to hear and determine all suits and other proceedings instituted against executors or administrators upon any demand against the estate of their testator, or intestate," the circuit court has no jurisdiction to enter a money judgment against the estate of a deceased person, or to charge the lands of the estate with the payment of such judgment. *Ib.*
4. EXECUTION OF TESTAMENTARY POWERS: STATUTE CONSTRUED. A power to sell land and invest the proceeds of sale, conferred by a will may, under the statute, (Wag. Stat., p. 93, § 1,) be executed by an administrator with the will annexed, the donee of the power having refused to execute it. *Evans v. Blackiston*, 437.
5. POWER OF ADMINISTRATOR TO OBTAIN EXTENSION OF NOTES. An administrator has the legal power to contract for the extension of the time of payment of a note executed by his testator, so long as it is not barred under the administration law. *North v. Walker's Admr.*, 453.
6. LACHES OF CREDITOR, WHAT IS NOT. Where such a contract is made, the creditor is not guilty of laches in not exhibiting and making application for the allowance of his claim against the estate within the time to which the payment has been extended, and the creditor cannot, therefor, invoke against him the statutory bar created by sections 2 and 6, article 4 of Wagner's Statutes. *Ib.*
7. SECTIONS 2 AND 6, p. 102, WAG. STAT., CONSTRUED. Where such a contract was made by the executor in good faith, and with the implied sanction of the probate court, and in the interest of the estate, and the creditor, in consequence thereof, was prevented from proving up his claim; and it appeared that, within four months after the testator's death, the creditor and executor appeared in the probate court and the executor waived service of notice, but the demand was not allowed for the reason that it was not then due, and that, within two years after publication of notice, the executor, at the instance of the creditor, filed the deed of trust describing the said note and the interest notes, which latter were paid by the executor, and filed with the papers of the estate as vouchers, with the approval of the court, and that the creditor brought suit upon the note in the circuit court within two months after the expiration of the extended time; *Held*, that there was a substantial compliance with sections 2 and 6, p. 102, Wag. Stat., in regard to the exhibition and application for allowance of the claim against the estate. *Ib.*

8. **EXECUTOR'S FINAL SETTLEMENT CONCLUSIVE ON HIS SURETIES.** An order of the probate court made upon a final settlement, ascertaining a balance to be due from an executor and directing him to pay it over, is conclusive against his sureties in an action on his bond, (*following, State v. Holt, 27 Mo. 340; State v. Rucker, 59 Mo. 17; Dix v. Morris, 514*)
9. **LIABILITY OF EXECUTOR ADMINISTERING ON REAL ESTATE.** Although the general principle is that the realty descends to the heir, and the executor has nothing to do with it, except in case of deficiency of assets; yet, when, as matter of fact, he assumes control of it and collects the rents, or when the will gives him authority to sell, and he exercises the authority, he is liable on his bond as executor, if he fails to account for the rents or for the proceeds of sales. *Ib.*
10. **ADMINISTRATOR'S SALE: EFFECT OF APPROVAL OUT OF TIME.** An order of a county or probate court approving a sale of real estate by an administrator, when made at a term different from that prescribed by law, is not void, but voidable only. (*Speck v. Wohlien, 22 Mo. 310; Strouse v. Drennan, 41 Mo. 289; Mitchell v. Bliss, 47 Mo. 354, criticised; Murray v. Purdy, 606.*)
11. **AN ADMINISTRATOR'S DEED** is not void by reason of the fact that the sale was reported to and approved by the court at the same term at which it was made, (*following Johnson v. Beazley, 65 Mo. 250. Sims v. Gray, 613.*)
12. **EJECTMENT: VOID ADMINISTRATOR'S DEED: EQUITY: PLEADING.** When a defendant in ejectment, holding under a deed made by the administrator of plaintiff's ancestor, admits that the deed does not convey the legal title, he cannot bar the plaintiff's recovery by showing that he paid the purchase money, that the administrator applied it in payment of the debts of the estate, and that he has since paid the taxes and made lasting improvements on the land; but these facts entitle him to have an account taken, and to have the sum found to be due him declared a lien upon the land.  
An answer setting up this defense and not praying such relief, is defective. *Ib.*

SEE ATTORNEY AND CLIENT, 1.

EVIDENCE, 13.

FRAUDULENT CONVEYANCE, 1, 2.

WITNESS, 4.

#### ADVERSE POSSESSIONS.

WHEN adverse possession is such that it may be presumed that the true owner had knowledge of it, and has acquiesced in it, or, if the indications of the claim and possession are so patent and so open that, if he remained in ignorance, it must have been his own fault, he will be barred, provided that the adverse possession has been continued for the requisite length of time. *Key v. Jennings, 356.*



## ADVERTISEMENT

SEE DEED OF TRUST

## AGREED COMBAT.

SEE MURDER, 8.

## AMENDMENT.

**JUDGMENT AGAINST A MARRIED WOMAN:** UNDER THE STATUTE OF AMENDMENTS AND JEOPAILS (Wag. Stat., pp. 1034, 1036, 1037, §§ 6, 19, 20), a judgment at law against several defendants, one of whom appears by the record to be a married woman, may, in furtherance of justice, be amended by the court which rendered it, at a subsequent term, by striking out the name of the married woman and permitting the judgment to stand as against the others.

PER HOUGH, J., DISSENTING.

**SUCH** a judgment is a mistake of law, and is erroneous, and can only be corrected on appeal or by writ of error; it is not an irregular judgment within the meaning of the statute authorizing judgments to be set aside by the court in which they were rendered for irregularity. *Weil v. Simmons*, 617.

SEE MISNOMER.

## APPEAL.

1. **APPEAL: FINAL JUDGMENT.** An appeal from an order setting aside a final judgment is premature. It should not be taken until another final judgment has been entered in the cause. *State ex rel. Merrill v. Burns*, 227.
2. **FINAL JUDGMENT.** In a suit for dower, a judgment that plaintiff should be endowed of a certain interest in specific real estate during her natural life, and that she should have and recover of defendant her costs, and have execution thereof, is not a final judgment, and from such judgment no appeal will lie. *Strickler v. Tracy*, 465.

SEE AMENDMENT, 1.

## ARBITRATION.

**THE** parties to a promissory note differing as to the amount remaining due upon it, referred their difference to arbitrators, who fixed the amount and informed the parties. The holder thereupon surrendered the note to the maker, who accepted it; *Held*, that he thereby assented to the award, and became bound to pay the amount fixed by the arbitrators, although they may not have proceeded regularly in ascertaining it. *Phillips v. Couch*, 219.

## ASSAULT TO KILL.

SEE FELONY.

## ASSAULT TO RAPE.

SEE RAPE.

## ATTACHMENT.

**MOTION TO SET ASIDE JUDGMENT AND QUASH EXECUTION.** A motion to set aside a judgment and to quash the execution for irregularity in the judgment, must, in attachment cases, be filed within two years after the rendition of the judgment, or it will be unavailing. *McGrew v. Foster*, 30.

SEE EXECUTION, 1.

GARNISHMENT, 1.

## ATTORNEY AND CLIENT.

**AN** attorney at law employed to attend to any and all cases that may arise affecting or designed to affect the title of his client to certain lands, is not thereby authorized to assist in procuring from the probate court an order that the lands be sold by the administrator of the former owner as the property of his intestate, even though this is done with a view of giving his client an opportunity to perfect his title by buying at such sale. *Hall v. Callahan*, 316.

SEE PRACTICE, 5.

## AUTREFOIS ACQUIT.

**LARCENY OF MONEY, NATIONAL BANK NOTES: EVIDENCE.** A plea of *autrefois acquit* to an indictment for stealing a national bank note, is sustained by proof of an acquittal upon an indictment for stealing money accompanied by evidence that both indictments were for the same act.

Under Sec. 31, p. 1091, Wag. Stat., evidence of the theft of the note was admissible in support of the indictment for stealing money, (overruling *State v. Kroeger*, 47 Mo. 530). *The State v. Moore*, 372.

## BILL OF EXCEPTIONS.

1. An entry of record is necessary to authenticate a bill of exceptions, and to show that it has been filed. *McGrew v. Foster*, 30.
2. **BILL OF EXCEPTIONS.** A bill of exceptions must be filed, in order to constitute a part of the record; and this must appear by an entry in the record proper; neither the indorsement of the clerk on the

bill of exceptions, "filed," with day and date, nor the statement, by the judge that it is signed, sealed and made part of the record, nor both, will suffice, (*following Fulkerson v. Houts*, 55 Mo. 301, and other cases). *Pope v. Thomson*, 661.

SEE PRACTICE IN SUPREME COURT, 2.

#### CASHIER.

SEE PRINCIPAL AND AGENT, 3.

#### CAVEAT EMPTOR.

THE doctrine of *caveat emptor* applies to one advancing money and taking a deed of trust upon personal property not in the possession of the grantor in the deed of trust, but in the possession of a third party. *Fletcher v. Drath*, 126.

#### CHAMPERTY.

IN this State, champertous contracts are void; but, a contract between attorney and client is not champertous, because the attorney agrees to receive, as a compensation for his services, a portion of the property in controversy; it is an essential element in a champertous contract, that he also agree to pay some portion of the costs or expenses of the litigation. *Duke et al. v. Harper et al*, 51.

#### CHANGE OF VENUE.

SEE VENUE.

#### CLERK'S FEES.

SECTION 24, ARTICLE 6, CONSTITUTION of 1865, fixed the maximum of the compensation of clerks of courts at twenty-five hundred dollars, but left it to the Legislature to determine what compensation they should receive within that maximum. (SHERWOOD, C. J., dissenting.) *In the matter of Burris*, 442.

#### CLOUD ON LAND TITLES.

SEE EQUITY, 2.

#### COMPUTATION OF TIME.

SEE PRACTICE, CRIMINAL, 5.

## CONFEDERATE STATES.

**SALE UNDER TRUST DEED, NOT AFFECTED BY VOLUNTARY ABSENCE OF TRUSTOR IN CONFEDERATE STATES.** A sale under a deed of trust given by a debtor to secure the payment of his debt, is not invalidated by the fact that at the time it was made he was residing within the military lines of the Confederate States, if he was a citizen of Missouri at the time the deed was executed, and his removal within the Confederate lines took place after the debt matured and was voluntary. *Martin v. Parson*, 260.

## CONSIDERATION.

1. **PLEADING CONSIDERATION OF A NOTE.** In declaring upon a written promise to pay money, it is not necessary to aver a consideration for the promise, but if one be averred, it must be a good consideration; otherwise the petition will be demurrable. *Glasscock v. Glasscock*, 627.

2. **CONTRACT FOR FORBEARANCE: PLEADING CONSIDERATION.** An agreement to give a debtor further time in which to make payment is an agreement for forbearance for a reasonable time.

In declaring upon a written promise to pay money made on the consideration of such an agreement, while it is not necessary to plead the consideration, yet if it is pleaded, the petition should state the time of forbearance actually extended. It is not sufficient to state that the creditor gave his debtor further time in which to pay, and did then forbear to enforce payment. *Id.*

## CONSIGNOR AND CONSIGNEE.

**CONSIGNMENT: NOT NOTICE TO CONSIGNEE THAT HE IS REGARDED AS PURCHASER.** The fact of a consignment of goods is not of itself notice to the consignee that he is held by the consignor as the purchaser of the goods sent. *Peck v. Ritchey*, 114.

## CONSTITUTIONAL LAW.

1. **EX POST FACTO LAWS.** The Legislature has no power to change the punishment of an offense by a statute passed after it is committed. Such legislation is *ex post facto*; and, except where such change consists in the remission of some separable portion of the punishment, a statute making it must be held constitutionally inapplicable to antecedent transactions. The court cannot inquire whether it should not be applied in every case where it may be supposed to mitigate the punishment; for there is no test by which to determine whether it has that effect. Per *SHERWOOD, C. J.*, *State ex rel. Houston v. Willis*, 131.

2. **SECTION 27, ARTICLE 4, CONSTITUTION OF 1865,** which provided that "the General Assembly shall not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town," was prospective in its operation only, and did not repeal an act in force at the time of the adoption of the

- constitution, giving such a right. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.
3. **CONDITIONAL PARDON.** Under the Constitution of 1865, the Governor had power to grant a conditional pardon, but the conditions, to be operative, should appear on the face of the paper. *Ex parte Reno*, 266.
  4. **CONSTRUCTION OF CONSTITUTIONS.** In general, constitutions, like statutes, are to be construed as prospective only, but when a contrary intent is plainly apparent from the words employed, a different construction will prevail. *The State ex rel. Baird v. Holladay*, 385.
  5. **CONSTITUTIONALITY OF LAWS.** The courts are warranted in declaring an act of the Legislature void, only where there is a clear conflict between it and the Constitution. *In the matter of Burris*, 442.
  6. **SECTION 32, ARTICLE 4, CONSTITUTION OF 1865**, required that the title of an act of the Legislature should indicate the general subject of the act, but did not require that it should set out its substance. *Ib.*
  7. **CLERK'S FEES: SECTION 24, ARTICLE 6, CONSTITUTION OF 1865**, fixed the maximum of the compensation of clerks of courts at twenty-five hundred dollars, but left it to the Legislature to determine what compensation they should receive within that maximum. (SHERWOOD, C. J., dissenting.) *Ib.*
  8. **EX POST FACTO LAWS.** The phrase defined (*following Calder v. Bull*, 3 Dallas 386). *Ex parte Bethurum*, 545.
  9. **RETROSPECTIVE LAWS.** The constitutional prohibition against the enactment of laws retrospective in their operation, relates to such as concern civil rights and remedies, and not such as concern crimes and punishments or criminal procedure. Constitution of 1875, Art. 2, § 18. *Ib.*
  10. **HABEAS CORPUS: CORRECTION OF JUDGMENTS IN CRIMINAL CASES.** The act of March 1st, 1877, (Sess. Acts, p. 261,) requiring any court to which application is made by *habeas corpus* for the release of any prisoner confined under a sentence which is erroneous as to time or place, to sentence him to the proper place of imprisonment or for the correct length of time, authorizes the correction of erroneous sentences passed previous to that date, and is not void either as an *ex post facto* law or as retrospective in its operation. *Ib.*
  11. **JURISDICTION AND PRACTICE IN SUPREME COURT IN HABEAS CORPUS CASES.** The foregoing act is not void as conferring original jurisdiction on the Supreme Court. That court has, under the constitution, original jurisdiction in *habeas corpus* cases, and the act is substantially an amendment to the *habeas corpus* act, prescribing the practice in such cases. *Ib.*
  12. **TAXATION: SECTION 30, ART. 1, CONSTITUTION OF 1865**, which provided that "all property subject to taxation ought to be taxed in proportion to its value," while it enjoined a uniform rule in imposing taxes on property, did not abridge the power of the Legislature to provide



revenue from other sources, (following *Glasgow v. Rowse*, 43 Mo. 479).  
*American Union Express Company v. City of St. Joseph*, 675.

13. **MUNICIPAL POWERS OF TAXATION: UNIFORMITY AND EQUALITY.** A city which is authorized by its charter to license, tax and regulate merchants, agents, express companies, insurance companies, &c., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city, and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike. *Id.*
14. **STATE TAXATION ON RECEIPTS OF EXPRESS COMPANIES, NO INFRINGEMENT ON POWER OF CONGRESS TO REGULATE COMMERCE.** A tax levied by State authority upon the gross receipts of an express company, whose business consists in receiving goods to be delivered at points outside of the State, to which the company's line does not extend, is not a violation of that provision of the constitution of the United States which confides to Congress alone the power to regulate commerce with foreign nations and among the several States, (following *Erie R. R. Co. v. Pennsylvania*, 15 Wall. 284). *Id.*

SEE CONTRACTS, 3, 4.

COURTS, 2.

SCHOOL, 2.

#### CONTRACT.

1. **DEED OF TRUST: NOTICE OF FORECLOSURE.** A stipulation in a deed of trust given to secure the payment of a debt, that in the event of default in payment the trustee may sell the trust property lying in Morgan county, at public sale, at the court house door in Boonville, Cooper county, first giving at least thirty days notice of the time, terms and place of sale, and of the property to be sold, by advertisement in Morgan or adjoining county, is not void for uncertainty or as being against public policy. Such matters are proper subjects of contract between the parties, and their contract is binding. *Martin v. Paxson*, 260.
2. **CONTRACTS OF PUBLIC CORPORATIONS: RATIFICATION OF, BY STATE.** The General Assembly, by an act passed in December, 1855, enacted, "that all contracts made by the trustees of the town of New Franklin; for the purpose of raising the amount authorized in the act of incorporation, be, and the same are hereby declared to be legal, and may be carried out according to the true intent and meaning of the parties thereto." At the time of the passage of this act, but two contracts had been made by the trustees, one in 1842, the other in 1849; and long prior to its passage, the contract of 1842 had been declared valid by the judgment of this court; *Held*, that the State,

by the act, intended to remove doubts as to the validity of the contract made by the trustees in 1849, and thereby ratified the same; and that a subsequent ratification by the State of a contract made by one of its own agencies is equivalent to a previous authorization. *The State ex rel. Attorney General v. Miller*, 328.

3. ———: MODIFICATION OF, WHEN VALIDATED BY LEGISLATIVE ACT: SUCH ACT NOT OBNOXIOUS AS A RETROSPECTIVE LAW. The act of 1855 is not obnoxious to the constitutional objection that it is retrospective in its operations; the State, as one of the contracting parties, had the same right to consent to the modification of the contract made in 1849, as it had to confer original authority on the town of New Franklin through its trustees to enter into the contract of 1842. *Ib.*
4. ———: ———: VESTED RIGHTS UNDER. Public corporations are the auxiliaries of the State in municipal government, and neither their existence nor their privileges, rest upon anything like a contract between them and the legislature; but, when such a corporation, by authority of the State, contracts with a third person, whereby rights become vested in such person, they cannot be divested by the State; such a contract becomes, *pro hac vice*, the contract of the State, and if imperfectly made, can be validated by it, and, when so validated, cannot be violated by the State. *Ib.*
5. ———: VESTED RIGHTS UNDER: WHEN THEY CANNOT BE DIVESTED BY QUO WARRANTO. When the State, through the agency of a public corporation, makes a contract with a third person, and such contract imposes no obligation upon such person to look to the application of the money to be paid by him under such contract, it cannot, by a proceeding by *quo warranto* forfeit and take away the right of the assignees of such person, because such corporation does not apply the funds realized to the object for which they were intended. *Ib.*
6. RATIFICATION OF INFANT'S CONTRACT. The validity of a promise by an adult to pay a debt incurred by him during his minority, is not affected by the fact that at the time of making the promise he believed himself legally liable to pay the debt, or by the fact that during his minority his curator kept him supplied with all necessities. *Ring v. Jamison, Admr.*, 424.
7. POWER OF A COURT OF EQUITY TO REFORM CONTRACTS. A court of equity will order a contract to be reformed so as to make it speak the actual agreement of the parties, when satisfied, that by mistake, in reducing it to writing, property has been transferred which it was not the intention of either should be included in the contract—and this in a case where the complainant himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of words, or through sheer carelessness. But where it appears that the complainant has been guilty of such breaches of the real contract as substantially to deprive the other party of all its benefits, the reformation will be ordered only on condition that the parties be put, as nearly as may be, in *statu quo*; as by the return of all moneys received by the complainant under the contract. *Cassidy v. Metcalf*, 519.

8. **SPECIFIC PERFORMANCE.** The specific performance of a contract for the sale of lands lying in another State, will be decreed in equity, whenever the party is resident within the jurisdiction of the court. *Olney v. Eaton*, 563.
9. **OBLIGATION PAYABLE IN MERCHANDISE : TENDER.** A merchant having an established place of business executed a contract for the payment of money in one year after date, but containing a stipulation that it should be "payable in merchandise to be taken during the year." *Held*, that he was under no obligation to tender the merchandise. Readiness on his part at his place of business whenever called upon by the creditor, to perform the contract, prevented any default being attributed to him. It was the duty of the creditor to select and take at his place of business such articles as he desired. *Lakey v. Chadwick*, 622.

## SEE CONSIDERATION, 2.

## INSURANCE, 1, 2.

## LANDLORD AND TENANT, 1.

## CONVEYANCE.

## SEE DEED.

## FRAUDULENT CONVEYANCE, 1.

## CORPORATION.

1. **CORPORATE EXISTENCE PROVED BY LEGISLATIVE RECOGNITION.** The State having sold a railroad to certain individuals, requiring them to form themselves into a corporation, and the Legislature having, in several subsequent acts, recognized the existence of the corporation; *Held*, that its existence could not be questioned by third parties, and such recognition dispensed with other evidence of the fact. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.
2. **CORPORATION DEED.** A deed from one corporation to another, is *prima facie* valid when signed by the proper officers, and under the corporate seal of the grantor, if, by law, the grantor has power to sell, and the grantee, to purchase. It devolves upon any one denying the validity of the deed on the ground that the stockholders have not assented to its execution, to prove that fact. *Id.*
3. **RIGHT OF INDIVIDUALS AND THE STATE TO DISPUTE THE EXERCISE OF CORPORATE FRANCHISES.** Individuals may resist the condemnation of their lands for a right of way for a railroad, after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road after the expiration of that time, over a right of way already acquired; and a city is an individual within the meaning of this rule, so that where a railroad company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets, on the ground that the time limited by charter for the completion of the road has expired. The State alone can proceed against the company to arrest the work on that ground. *Id.*

4. **RAILROADS: ACCEPTANCE OF STATUTORY PRIVILEGES.** An act passed in 1864, (Sess. Acts, p. 478,) authorized several railroad companies to connect their lines, and for that purpose granted them certain privileges. No time was prescribed within which the companies should accept the act. The connection was made in 1873; *Held*, that this was an acceptance of the act, and that the acceptance was in time. *Ib.*
5. **RAILROADS: DUTY OF CONDUCTOR IN EJECTING PASSENGER.** If one goes upon a railroad train intending, in good faith, to become a passenger, the conductor, while he has the undoubted right to put him off if the rule of the company prohibits the carrying of passengers on that train, has no right for that reason to eject him violently, or in such a manner as to imperil his life, as by pushing or ordering him off while the train is in motion, and if he does, the company is responsible in damages for any resulting injury. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

SEE MUNICIPAL CORPORATION.

#### COSTS

**PRACTICE: POOR PERSON: SECURITY FOR COSTS.** An order, allowing the plaintiff to sue as a poor person, is, in effect, revoked by a subsequent order requiring him to give security for costs, and the absence of a formal order of revocation is not such an irregularity as will justify an appellate court in reversing the judgment of dismissal by the trial court for failure to furnish such security. *Kelty v. Valle*, 601.

#### COUNTY BONDS.

**RAILROAD BONDS: FRAUDULENT ISSUANCE OF: INNOCENT PURCHASER.** Where certain railroad bonds were fraudulently issued by means of a covenous conspiracy formed between two of the justices of the county court, their deputy clerk, the prosecuting attorney and others, and, upon a division of the bonds in St. Louis, one of the conspirators received \$55,000 in the fraudulent bonds, and effected a sale of them to Mastin & Co., bankers in Kansas City, two days thereafter, under circumstances which showed that the members of that firm, as well as defendant, had such notice of the fraud perpetrated, as should have forbidden a purchase of the bonds; *Held*, first, that although the evidence of such knowledge was not of a direct, positive character, yet, that it was sufficient, if it established the fact of knowledge by reasonable inferences deduced from facts which were proven; and to such obvious inferences courts are not permitted to close their eyes; second, that though, primarily, the presumption favors the holder of paper acquired before maturity, yet, that such a presumption dwindles into insignificance when circumstances of the nature above noted, occur; third, that the bonds having been fraudulently issued, the *onus* of showing their acquisition in good faith devolved on defendant; fourth, that Mastin & Co., as well as defendant, being chargeable with notice, the latter could not successfully invoke the doctrine which permits even a purchaser, with notice, to purchase from one without notice; and as there were many mysteries, contradictions and incongruities apparent in the testimony, and defendant, whose deposition had been

previously taken, conducted the trial, but failed to introduce any evidence in contradiction to, or explanation of, certain damaging statements, tending very strongly to establish his lack of good faith, his failure to introduce such evidence, created a presumption adverse to his success; and such unfavorable presumption is very strong, when the *bona fides* of the given transaction is questioned by the form of the procedure, and the nature and organization of the court, where instituted; that, although the testimony of defendant tended to show the transfer of the bonds by him before suit brought, yet as such alleged transfer occurred the day after the notice of injunction was served on him, and with evident intent to evade the process of the court, and he had made statements about the bonds which he afterwards contradicted in his deposition; that, as the transferee of the bonds was not complaining, defendant could not be heard to vicariously complain; and the trial court having disbelieved his testimony respecting the transfer of the bonds, this court would do likewise; and held, further, that as defendant kept the bonds concealed so that their whereabouts could not be discovered, nor they be reached by ordinary process, and as defendant threatened to transfer the bonds, although the bonds were really invalid, yet, as they were apparently good, the remedy by law was manifestly inadequate, and equity would interfere—this being a case analogous to that where it interferes to remove a cloud upon a title to land. *Cass County v. Green*, 498.

## COURTS.

1. **INFERIOR: LIMITED.** A court is inferior to another under whose supervisory or appellate control it is placed; a court of limited jurisdiction is also inferior to a court of general jurisdiction. Limited jurisdiction extends only to certain specified causes; general, to a great variety of matters. *State v. Daniels*, 192.
2. **CRIMINAL COURT OF THE SIXTH JUDICIAL CIRCUIT AND THE COUNTY OF JOHNSON, AN INFERIOR AND CONSTITUTIONAL COURT.** Section 13, Art. 6, of the constitution of 1865, declared "that the circuit court shall have jurisdiction over all criminal cases, which shall not otherwise be provided for, by law." *Held*, that this section, by necessary implication, authorized the legislature to provide by law for taking from circuit courts jurisdiction over all criminal matters. *Held*, also, that Sec. 4, of the Schedule of the constitution of 1875, providing "that all courts organized and existing under the laws of the State, and not specially provided for in this constitution, shall continue to exist until otherwise provided for by law," must be regarded, till other provision is made, as imparting vitality to the criminal court of the Sixth Judicial Circuit and Johnson county, which was organized and existing at the time of the adoption of the constitution of 1875. *Held*, also, that Sec. 23, Art. 6, of the constitution of 1875, providing that circuit courts shall exercise superintending control over criminal courts, \* \* \* in each county in their respective circuits, places the criminal court in question in the class of inferior courts which the General Assembly may establish in virtue of Sec. 1, Art. 6, of the constitution of 1865. *Held*, also, that the act of 1875, creating the court in question, was not obnoxious to that provision of the constitution of 1865, which prohibits the enactment of a special law when a general law could be made applicable; so held, on the ground that it was for the legisla-



ture to determine whether a necessity existed for this criminal judicial circuit, and did not exist for such circuits in other portions of the State. *Ib.*

3. **CHANGE OF VENUE FROM THIS COURT.** In the act establishing this court, it was provided that, "In all cases where a change of venue is granted from said criminal court on the ground of prejudice, or other disqualification of the judge of said court, the same shall be certified to the circuit court of the county in which said cause shall be pending," but there was in said act this further provision, "that all acts now in force, or that may hereafter be made, regulating the criminal practice and proceedings in courts of record, \* \* \* shall govern the proceedings in said criminal court so far as the same may be applicable;" and by a subsequent act it was declared, "that hereafter no change of venue shall be awarded in any indictment or criminal prosecution in any circuit or criminal court in either of the following cases," the prejudice of the judge being one of the specified causes, and it was further declared that whenever in any cause an application should be made for a change of venue for any of the specified causes, the judge should make an order for the election of a special judge to try the case; *Held*, that the court was powerless to make any other order than one for the election of a special judge to try the cause. *Ib.*
4. **RECORDS.** Where the record of an inferior court, which is, however, a court of record, and exercises its jurisdiction according to the course of the common law, recites that members of the bar, exceeding three in number, voted at the election of a special judge, the further recital that such members of the bar were duly licensed and enrolled is not required. *Ib.*
5. **THE PROBATE AND COMMON PLEAS COURT OF GREENE COUNTY** was not abolished by the constitution of 1875. *State v. Hart*, 208.
6. **PROBATE JURISDICTION: STATUTE CONSTRUED.** In a county in which a probate court is established, having by statute exclusive original jurisdiction "to hear and determine all suits and other proceedings instituted against executors or administrators upon any demand against the estate of their testator, or intestate," the circuit court has no jurisdiction to enter a money judgment against the estate of a deceased person, or to charge the lands of the estate with the payment of such judgment. *Wernecke v. Kenyon*, 275.

#### COURTESY.

SEE LIMITATIONS, 2.

#### COVENANT.

SEE MINING LICENSE, 1.

#### CRIMINAL LAW.

- **NEGLIGENTLY COMPOUNDING A MEDICAL PRESCRIPTION.** An indict-

ment under Sec. 18, p. 447, Wag. Stat., against a druggist for manslaughter in negligently filling a medical prescription with opium, by reason of which the person to whom it was administered died, failed to charge that defendant delivered the medicine to any one to be administered to deceased, or to state what were the ingredients named in the prescription, or the respective quantities of the several ingredients, or by whom the medicine was prescribed; *Held*, that these were essential averments, and without them the indictment was defective. *State v. W. H. Smith*, 92.

2. AUTREFOIS ACQUIT: LARCENY OF MONEY, NATIONAL BANK NOTES: EVIDENCE. A plea of *autrefois acquit* to an indictment for stealing a national bank note, is sustained by proof of an acquittal upon an indictment for stealing money accompanied by evidence that both indictments were for the same act.

Under Sec. 31, p. 1091, Wag. Stat., evidence of the theft of the note was admissible in support of the indictment for stealing money, (overruling *State v. Kroeger*, 47 Mo. 530.) *State v. Moore*, 372.

3. ARREST: NOTICE OF OFFICER'S AUTHORITY, WHAT SUFFICIENT. An officer duly appointed and qualified, and authorized by a warrant to arrest any offender, gives sufficient notice of his authority to do so by reading to him the warrant of arrest. *State v. Green*, 631.

SEE EVIDENCE, 7, 8.

GRAND JURY, 1.

OFFICER, 1, 2, 3, 4.

CROSS-BILL.

SEE PRACTICE, 3.

DAMAGES.

1. POWER OF SCHOOL DIRECTORS TO MAKE RULES: LIABILITY FOR ENFORCING THEM. The school law (W.S., p. 1264, § 8), provides that the board of directors "shall have power to make and enforce all such needful rules and regulations for the government, management and control of the schools and their property as they shall think proper \* \* not inconsistent with the laws of the land." A board of directors having made a rule that no pupil should, during the school term, attend a social party, the plaintiff, a pupil of the school, by the permission of his parents, violated the rule, and was expelled from the school for so doing. In an action against the directors to recover damages for the expulsion, *Held*, 1st, that under the law, they had the power to make needful rules for the government of pupils while at school, but no power to follow them home and govern their conduct while under the parental eye; that in prescribing the foregoing rule they had gone beyond their power, and had invaded the rights of the parents; but, 2nd, as there was no malice, oppression or willfulness on the part of the directors, they were not liable in damages. *Dritt v. Snodgrass*, 286.

2. **DAMAGES, COMPENSATORY AND EXEMPLARY.** A passenger can only recover for a wrongful expulsion from the car of a railroad company, such damages as he has actually sustained, and which he could not have averted by reasonable exertion, care and prudence, unless he was ejected in a wanton, rude or aggravated manner, indicating oppression, malice or a desire to injure, in which case, he may recover punitive or exemplary damages from the company, where, after knowledge of the fact, they retain in their employ, and in the same capacity, the servant who has been guilty of such misconduct. *Graham v. Pacific Railroad Co.*, 536.
3. **DAMAGES: WHEN NOT SO EXCESSIVE AS TO AUTHORIZE REVERSAL.** A judgment will not be disturbed on the ground of excessive damages, where the right to recover damages was clearly established, and it does not appear that the sum assessed is so disproportionate to the injury as to bear marks of passion, prejudice or corruption on the part of the jury. *Ib.*
4. **RAILROADS: PASSENGER, RIGHTS OF: "STOCK PASS."** A passenger who presents to the conductor a "stock pass" from the railroad company which entitles him to return on their road without payment of fare, can recover damages sustained by him, when so returning, caused by his expulsion from the cars by the conductor for non-payment of the fare, although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes, and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return. *Ib.*
5. **CONFLICTING EXECUTIONS: SHERIFF'S DUTY: MEASURE OF DAMAGES.** Although a sheriff having property in his possession by virtue of a writ of attachment from a court of competent jurisdiction, has no right before the determination of the attachment suit, to sell the property under an execution from a co-ordinate court, issued upon a judgment of foreclosure of a mortgage obtained by another party in a suit begun after the levy of the attachment, yet if he does sell in a case where the mortgage was recorded before the attachment was levied, and is for an amount greater than the value of the property, he will be liable to the attaching plaintiff in nominal damages at most. *Metzner v. Graham*, 653.

SEE PERSONAL INJURIES, 1.

RAILROADS, 15, 17, 18, 19, 20.

## DEEDS.

- 1 **CORPORATION DEED.** A deed from one corporation to another, is *prima facie* valid when signed by the proper officers, and under the corporate seal of the grantor, if, by law, the grantor has power to sell, and the grantee to purchase. It devolves upon any one denying the validity of the deed on the ground that the stockholders have not assented to its execution, to prove that fact. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.
- 2 **RESCISSION FOR MISDESCRIPTION.** Misdescription of land in a deed

will not authorize rescission of the contract of sale, when it appears that the vendee has been put into possession of the very land which he intended to buy and the vendor intended to sell, and that he has for several years retained undisputed possession; nor when the vendor offers to deliver a deed correctly describing the land. *Key v. Jennings*, 356.

3. AN ADMINISTRATOR'S DEED is not void by reason of the fact that the sale was reported to and approved by the court at the same term at which it was made, (*following Johnson v. Beazley*, 65 Mo. 250.) *Sims v. Gray*, 613.
4. DEEDS, CONSTRUCTION OF: CALLS FOR QUANTITY. In ascertaining the land that has been conveyed by a deed, a call for quantity will be rejected when inconsistent with the actual area of the premises as particularly described. *Ware v. Johnson*, 662.

SEE ADMINISTRATION, 12.

EVIDENCE, 17.

#### DEED OF TRUST.

1. ONE who gives a deed of trust upon land cannot afterwards make any agreement concerning the same to the prejudice of the title conveyed by the deed. A subsequent contract with a stranger permitting him to inclose and use part of the land, is void as against a purchaser at a sale under the deed of trust. *Sims v. Field*, 111.
2. SUBSTITUTION OF TRUSTEES. It is not necessary to the validity of proceedings under Rev. Stat. 1855, p. 1554, § 1, for the appointment of the sheriff to act as trustee in executing a deed of trust given to secure the payment of a debt in place of the person therein named as trustee, that the latter shall have signed the deed or otherwise signified his acceptance of the trust; nor is notice of the proceeding required to be given to the trustor. *Martin v. Paxson*, 260.
3. SALE UNDER TRUST DEED, NOT AFFECTED BY VOLUNTARY ABSENCE OF TRUSTOR IN CONFEDERATE STATES. A sale under a deed of trust given by a debtor to secure the payment of his debt, is not invalidated by the fact that at the time it was made he was residing within the military lines of the Confederate States, if he was a citizen of Missouri at the time the deed was executed, and his removal within the Confederate lines took place after the debt matured and was voluntary. *Ib.*
4. DEED OF TRUST: NOTICE OF FORECLOSURE. A stipulation in a deed of trust given to secure the payment of a debt, that in the event of default in payment the trustee may sell the trust property lying in Morgan county, at public sale, at the court house door in Boonville, Cooper county, first giving at least thirty days notice of the time, terms and place of sale, and of the property to be sold, by advertisement in Morgan or adjoining county, is not void for uncertainty or as being against public policy. Such matters are proper subjects of contract between the parties, and their contract is binding. *Ib.*

5. **DISTRIBUTION OF PARTNERSHIP ASSETS.** A partner sold his interest in the firm to his co-partner, who agreed to pay the firm debts. The firm was at the time insolvent. After the sale the continuing partner gave a deed of trust on all the assets of the late firm to secure the payment of an individual indebtedness of his own, which accrued prior to the dissolution. In a contest between a creditor of the firm and the individual creditor, *Held*, that the right of the former to be paid out of the firm assets in preference to the latter was not impaired by the dissolution, and as against him the deed of trust was a nullity. *Phelps v. McNeely*, 554.
6. **EVIDENCE: THE RECITALS IN A TRUSTEE'S DEED** purporting to be executed in pursuance of a power of sale given by a deed of trust, are of themselves, no evidence of the facts stated, unless made so by express provision of the deed of trust, (*following Neilson v. Chariton Co.*, 60 Mo. 386; *Vail v. Jacobs*, 62 Mo. 130). *Hancock v. Whybark*, 672.
7. **TRUSTEE'S AFFIDAVIT OF NOTICE: ADVERTISEMENT.** The affidavit of a trustee in a deed of trust showing compliance with a requirement of the deed that he should give notice of sale by posting an advertisement in ten public places before proceeding to sell under it, is not admissible in evidence as a publisher's affidavit within the meaning of section 7, p. 125, Wag. Stat. He must be introduced as a witness to prove the fact. *Ib.*
8. **EVIDENCE: ESTOPPEL.** Evidence showing that the power of sale was extinguished by payment of the debt before the sale under the deed of trust, is admissible where the purchaser at such sale is the *cestui que trust*, and is seeking to recover possession of the property purchased from the grantor in the deed of trust. But, evidence of facts constituting an estoppel against the grantor from setting up such a defense, is also admissible. *Ib.*
9. **EVIDENCE** is admissible to show that a portion of the property seized by the sheriff, under a writ of replevin, as appurtenant to certain personal property conveyed by a deed of trust, was not a part thereof when the deed was executed, and was not included therein. Whether it passed as after acquired property is a question of law for the court on the facts proven. *Ib.*

SEE CAVEAT EMPTOR, 1.

#### DELIBERATION.

SEE MURDER, 1.

#### DELIVERY.

SEE PARDON, 2.



## DESCENT.

**UNLAWFUL MARRIAGE: INHERITABLE CAPACITY OF ISSUE.** Under section 8, p. 328, Rev. Stat. 1825, which provides that the issue of all marriages deemed null in law \* \* shall, nevertheless, be legitimate, a child of such a marriage will inherit and transmit by descent the same as if born of a lawful marriage. *Dyer v. Brannock*, 391.

## DISEASE.

**AS AFFECTING LIABILITY FOR PERSONAL INJURIES.** The liability of a railroad company for a violent ejection of a passenger from its train, is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

## DOWER.

**FINAL JUDGMENT: APPEAL.** In a suit for dower, a judgment that plaintiff should be endowed of a certain interest in specific real estate during her natural life, and that she should have and recover of defendant her costs, and have execution thereof, is not a final judgment, and from such judgment no appeal will lie. *Strickler v. Tracy*, 465.

## DRUGGIST.

**NOT A PRIVILEGED WITNESS.** A drug and prescription clerk may be compelled to testify what medicines he has furnished to a party to a suit, and it is error for the court to allow his claim of privilege when interrogated as to that matter. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

SEE NEGLIGENTLY COMPOUNDING MEDICAL PRESCRIPTION.

## EJECTMENT.

**PRACTICE: CHANGE OF VENUE: JURISDICTION.** Unless an ejectment case is transferred by a proper order entered of record from the court of the county in which the land lies, no court in any other county can acquire jurisdiction of it; and the question of jurisdiction may be raised for the first time in the Supreme Court. *Bray v. Marshall*, 122.

SEE ADMINISTRATION, 1.

EQUITY, 7.

EVIDENCE, 18.

LICENSE, 4.

## ELECTION.

**NOTICE OF CONTEST.** The statute (Wag. Stat., p. 573, § 57) requires contested elections to be determined at the first term of the county court, which shall be held fifteen days after the official count, but does not specify whether the term shall be a regular, or a special, or an adjourned term, although provision is made by law for all such terms. Notice was given by the contestant that he would contest the election of the contestee to the office of collector, at the next term of the county court, to be begun and holden on the first Monday in January, 1877, but it appeared that the next term after this notice was given was on the first Monday in February, 1877, and that no court was held in January; *Held*, that the day specified in the notice was material, and that the notice given was insufficient to sustain proceedings begun on the first Monday in February. *Adcock v. Lecompt*, 40.

## EQUITY.

1. **PURCHASE WITH NOTICE: TRUSTEE: ESTOPPEL.** Defendants' grantor entered a tract of government land, and took from the receiver of the local land office a receipt for the purchase money, describing the land. By a mistake of the officer the records of the General Land Office at Washington were made to show an entry of a different tract, and a patent was issued accordingly. The records of the local office were afterwards destroyed by fire. Without taking actual possession defendants' grantor claimed to be the owner of the tract designated in the receipt. Nevertheless, for a period of seventeen years he permitted the other tract to be assessed to him for taxation, and during a part of the time at least, paid the taxes on it. The tract described in the receipt never was assessed to him. Plaintiff knew that defendants' grantor had intended to enter that tract, and that he claimed title to it. Finding, however, that the government records showed it to be vacant and subject to entry, plaintiff purchased and obtained a patent for it in his own name. Neither the defendants nor their grantor ever took any step to have the mistake corrected until after the issue of the patent to plaintiff; *Held*. 1st, That these facts were not sufficient to put plaintiff on inquiry, or to affect him with notice of a title in defendants, or to constitute him a trustee for them; 2d, That defendants had acquiesced in the entry as made, and were estopped to claim title to the other tract.

BUT PER NAPTON AND NORTON, JJ., DISSENTING.

*Held*, that the question which tract defendants' grantor had in fact entered, was a judicial question: that the decision of the land officers of the government and the issuing to him of the patent for the other tract was not conclusive on him or his grantees, and that plaintiff took the title as trustee for them. *Sensenderfer v. Smith*, 80.

2. **REMOVING CLOUD ON LAND TITLES.** A suit to remove a cloud upon the title to land cannot be maintained by one not in actual possession of the land, nor where the evidence preponderates against the plaintiff's claim of title. *Keane v. Kyne*, 216.

3. **POWER OF A COURT OF EQUITY TO REFORM CONTRACTS.** A court of equity will order a contract to be reformed so as to make it speak the actual agreement of the parties, when satisfied, that by mistake, in reducing it to writing, property has been transferred which it was not the intention of either should be included in the contract—and this in a case where the complainant himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of words, or through sheer carelessness. But where it appears that the complainant has been guilty of such breaches of the real contract as substantially to deprive the other party of all its benefits, the reformation will be ordered only on condition that the parties be put, as nearly as may be, in *statu quo*; as by the return of all moneys received by the complainant under the contract. *Cassidy v. Metcalf*, 519.
4. **EQUITY PRACTICE: VENDOR'S LIEN: CROSS-BILL: HARMLESS ERROR OF TRIAL COURT.** In a suit to enforce a vendor's lien, the answer, after denying the alleged indebtedness, pleaded specially that plaintiff agreed to receive lands in Kansas as part payment of the purchase money, tendered a deed, and prayed specific performance. The reply admitted a contract for purchase of the Kansas lands, but charged that this was a separate transaction, having no connection with the first. On this issue the trial court found for the plaintiff; in which finding this court, upon an examination of the evidence, concurred. The trial court, after all the evidence had been heard, dismissed that portion of the answer pleading the contract to pay in lands, treating it as a cross-bill; *Held*, that this was error; that this portion of the answer was pleaded as a part of the main transaction, and as a defense to plaintiff's action, and that the prayer for specific performance of that contract was in substance a prayer that the court would effectuate the main contract of the parties, as understood by defendant, and, as such, that there was no necessity for the dismissal; but, as the judgment would have been the same, whether this portion of the answer were dismissed or not, there was no such error as would justify a reversal of the judgment. *Olney v. Eaton*, 563.
5. **SPECIFIC PERFORMANCE.** The specific performance of a contract for the sale of lands lying in another State, will be decreed in equity, whenever the party is resident within the jurisdiction of the court. *Ib.*
6. **EQUITY JURISDICTION TO OPEN SETTLEMENTS: PLEADING.** An action to open a settlement of joint account transactions cannot be maintained, if it appears that the plaintiff was aware, when he made the settlement, of the facts on which he bases his claim to relief; and this is true although that defense is not set up in the answer. *Quinlan v. Keiser*, 603.
7. **EJECTMENT: VOID ADMINISTRATOR'S DEED: EQUITY: PLEADING.** When a defendant in ejectment, holding under a deed made by the administrator of plaintiff's ancestor, admits that the deed does not convey the legal title, he cannot bar the plaintiff's recovery by showing that he paid the purchase money, that the administrator applied it in payment of the debts of the estate, and that he has since paid the taxes and made lasting improvements on the land; but these facts entitle him to have an account taken, and to have the sum found to be due him declared a lien upon the land.

An answer setting up this defense and not praying such relief, is defective. *Sims v. Gray*, 613.

SEE COUNTY BONDS.

### ESTOPPEL.

1. **ESTOPPEL BY PLEA: HUSBAND AND WIFE.** A defendant in a vendor's lien case cannot, after a verdict against him upon a plea of payment, avail himself of evidence that he had never contracted to pay for the land, given upon an issue of non-assumpsit made between the plaintiff and other defendants in the case; and where husband and wife are defendants, and the husband has no other interest than as tenant by the courtesy in the land of which his wife is owner, a verdict so rendered affects his interest equally with hers, although he may, in a separate answer, have pleaded non-assumpsit, and, upon a trial, the plea may have been found in his favor. *Chapman, Admr. v. Callahan*, 299.
2. **HUSBAND AND WIFE: ESTOPPEL.** Acts of a husband in respect of the lands of his wife not held as her separate estate, cannot operate an estoppel upon her. *Hall v. Callahan*, 316.

SEE DEED OF TRUST, 8.

FRAUD, 1.

LICENSE, 1. 2.

NOTICE, 2.

SCHOOLS, 2.

TAXES AND TAXATION, 5.

### ESTRAYS.

SEE FENCES, 1, 2.

### EVIDENCE.

1. **MURDER: THE BONES OF THE DEAD MAN** may be exhibited in evidence upon a trial for murder, for the purpose of showing to the jury the attitudes and relative positions of the deceased and defendant, when the fatal shot was fired. *State v. Wieners*, 13.
2. **EVIDENCE, PAROL: RECORDS.** Parol evidence, in order to overcome record evidence, should be of the most unquestionable and conclusive character. *Sensenderfer v. Smith*, 80.
3. **EVIDENCE OF THREATS.** Upon a trial for murder, evidence of threats made by deceased against defendant, is not admissible to justify the killing, but is admissible as conducing to show that an

assault was first made by deceased upon defendant, when there is other evidence tending to prove such assault. When there is none such, evidence of threats is not admissible for any purpose. *State v. Alexander*, 148; *State v. Lee*, 165.

4. EVIDENCE OF CHARACTER. The good character of the accused is an ingredient to be submitted to the jury like any other fact, and evidence to prove good character is admissible in every criminal case. If the jury believe the accused to be guilty, they must not acquit him because he has borne a good character; and on the other hand if all the other evidence, taken by itself proves him guilty, they must not, for that reason, fail to consider the evidence of character. *State v. Alexander*, 148.
5. EVIDENCE: CRIMINAL PRACTICE. The written report of the testimony of a witness taken before a committing magistrate, is not admissible as evidence on a criminal trial at which the witness is present and testifies, when not offered either to impeach the witness or to refresh his memory, but as independent testimony. *State v. Lee*, 165.
6. DECLARATIONS BY A WIFE, NOT EVIDENCE AGAINST HER HUSBAND. A proposal to have a criminal charge hushed up made by the wife of the accused, in his absence, is not admissible in evidence against him upon a trial for the alleged offense. *State v. Jaeger*, 173.
7. CRIMINAL LAW: EVIDENCE. Upon the trial of a criminal case, proof that, since the finding of the indictment, defendant was arrested in a distant State on another indictment, and that he attempted to escape, is inadmissible.  
For the purpose of showing that he has attempted to avoid the prosecution, the indictment, on which he is being tried, may be read in evidence in connection with proof that he has previously forfeited his recognizance and left the State. But the court should instruct the jury that it is admissible as evidence for this purpose only, and should not leave them to infer that in determining the guilt or innocence of defendant, they have a right to consider the fact that the grand jury has indicted him for the crime. *State v. Hart*, 208.
8. UPON a trial for a felonious assault, evidence that the person alleged to have been assaulted by defendant, was on the same day assaulted by others, and was subsequently killed, is inadmissible. *Ib.*
9. CHARGE OF UNLAWFUL SHOOTING, SUSTAINED BY PROOF OF NEGLIGENT SHOOTING. Under the present practice, proof of a negligent or careless shooting will sustain an allegation of an unlawful and wrongful shooting; the same was true, at common law, where an action of trespass for assault and battery was the proper form of action for direct injuries negligently and carelessly inflicted, as well as for those that were intentional and malicious. *Conway v. Reed*, 346.
10. PRIMA FACIE CASE. In an action for damages, sustained from injuries caused by an unlawful and wrongful assault and shooting, plaintiff is *prima facie* entitled to a verdict upon proof that he was shot by defendant; it then devolves upon the defendant to show that the shooting occurred without fault on his part, or to put in evidence mitigating facts; it is not necessary that plaintiff, in the first place



and by direct evidence, should show either an intention to commit the injury or that defendant was in fault. *Ib.*

11. **SCOPE OF AGENCY: HOW SHOWN.** The authority of an agent to act in a given manner, may be inferred from the mere fact and the nature of his employment, or from long continued and repeated acts of acquiescence by his employer. *Edwards v. Thomas*, 468.
12. **STATEMENTS OF AGENT.** Third persons have a right to rely upon the statements of an agent as to the existence of such extrinsic matters relating to his agency as lie within his own peculiar knowledge. *Ib.*
13. **WILL: DECLARATIONS OF A TESTATOR** made after the execution of his will, tending to show that it was not satisfactory to him, and that he had made, or would make other dispositions of his property, are not admissible in evidence for the purpose of impeaching the will, (*following Gibson v. Gibson*, 24 Mo. 227, and *Cawthorn v. Haynes*, *Ib.* 237). *Spoonemore v. Cables*, 579.
14. **EVIDENCE OF CHARACTER.** When a witness has testified that the character of another witness for truth and veracity is bad, it is discretionary with the trial court to admit or reject further testimony from the same witness to prove his general moral character also to be bad. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588
15. **COMPLAINTS OF PHYSICAL PAIN** made by one suffering from a recent injury, are admissible in evidence on behalf of the sufferer in an action to recover damages for the injury. *Ib.*
16. **TESTIMONY FALSE IN PART: PROVINCE OF THE JURY.** If the jury believe that a witness has willfully sworn falsely as to any material fact, they are at liberty to disregard the whole of his evidence, as well those parts of it which may be corroborated by other evidence as those which are uncorroborated. *Ib.*
17. **DEED: COPY AS EVIDENCE.** A certified copy of an administrator's deed is not admissible in evidence, when the original is in the possession of the party offering the copy, although it is not offered as evidence of title, but only for the purpose of proving the sale by the administrator and the purchase by himself. *Sims v. Gray*, 613.
18. **LAND SHARK.** It is error in an ejectment case to admit evidence that plaintiff is a "land shark." *Sensenderfer v. Neale*, 669.
19. **THE RECITALS IN A TRUSTEE'S DEED** purporting to be executed in pursuance of a power of sale given by a deed of trust, are of themselves, no evidence of the facts stated, unless made so by express provision of the deed of trust, (*following Neilson v. Chariton Co.*, 60 Mo. 386; *Vail v. Jacobs*, 62 Mo. 130.) *Hancock v. Whybark*, 672.
20. **TRUSTEE'S AFFIDAVIT OF NOTICE: ADVERTISEMENT.** The affidavit of a trustee in a deed of trust showing compliance with a requirement of the deed that he should give notice of sale by posting an advertisement in ten public places before proceeding to sell under it, is not admissible in evidence as a publisher's affidavit within the

meaning of section 7, p. 125, Wag. Stat. He must be introduced as a witness to prove the fact. *Ib.*

21. DEED OF TRUST: EVIDENCE: ESTOPPEL. Evidence showing that the power of sale was extinguished by payment of the debt, before the sale under the deed of trust, is admissible where the purchaser at such sale is the *cestui que trust*, and is seeking to recover possession of the property purchased from the grantor in the deed of trust. But, evidence of facts constituting an estoppel against the grantor from setting up such a defense, is also admissible. *Ib.*
22. DEED OF TRUST: EVIDENCE is admissible to show that a portion of the property seized by the sheriff, under a writ of replevin, as appurtenant to certain personal property conveyed by a deed of trust, was not a part thereof when the deed was executed, and was not included therein. Whether it passed as after acquired property is a question of law for the court on the facts proven. *Ib.*

SEE AUTREFOIS ACQUIT, 1.

CORPORATION, 1, 2.

COUNTY BONDS.

INSURANCE, 2, 3.

LARCENY.

MURDER, 5, 12, 14.

PRACTICE IN SUPREME COURT, 1.

PRINCIPAL AND AGENT, 1.

VARIANCE, 1.

WITNESS, 4.

## EXECUTION.

1. CONFLICTING EXECUTIONS: SHERIFF'S DUTY: MEASURE OF DAMAGES. Although a sheriff having property in his possession by virtue of a writ of attachment from a court of competent jurisdiction, has no right before the determination of the attachment suit, to sell the property under an execution from a co-ordinate court, issued upon a judgment of foreclosure of a mortgage obtained by another party in a suit begun after the levy of the attachment, yet if he does sell in a case where the mortgage was recorded before the attachment was levied, and is for an amount greater than the value of the property, he will be liable to the attaching plaintiff in nominal damages at most. *Metzner v. Graham*, 653.
2. SALE UNDER EXECUTION: SHERIFF'S POWER TO AMEND DEED. When a sheriff has executed a deed in pursuance of a sale under execution, conveying land by the same description by which it was adver-

tised and sold, his power is at an end. He cannot afterwards execute another deed conveying by a different description the land which he intended to sell, and which the bidders at the sale understood was being sold. *Ware v. Johnson*, 662.

#### EXECUTOR.

SEE ADMINISTRATION.

#### FAILURE OF TITLE,

SEE RESCISSION, 1, 4.

#### FEES.

SEE CLERK'S FEES.

#### FELONY.

**DEFINITION OF FELONY: ASSAULT WITH INTENT TO KILL.** Under the statute defining felony (Wag. Stat., p. 516, Sec. 33), any offense is a felony which is liable to be punished by imprisonment in the penitentiary. The fact that it may also be punished by fine, or by fine and imprisonment in the county jail, does not alter its character, (*following Johnston v. State*, 7 Mo. 183). Assault with intent to kill is a felony. *State v. Green*, 631.

#### FENCES.

1. **RAILROAD: NON-LIABILITY FOR CATTLE DROWNED ON COMPANY'S LAND.** The forty-third section of the Railroad Law, (Wag. Stat., p. 310, § 43,) imposes upon a railroad company no liability to the owner of cattle accidentally drowned in an unenclosed well situated on the company's right of way, notwithstanding the loss is occasioned by the failure of the company to erect and maintain proper fences as required by that section. *Hughes v. Hannibal & St. Jo. R. R. Co.*, 325.
2. **UNENCLOSED LANDS: PROPRIETOR NOT LIABLE FOR ACCIDENTAL INJURY TO CATTLE COMING UPON THEM.** The proprietor of unenclosed land is under no obligation to make it safe for pasturage, and if the cattle of another stray upon it and are killed by drowning in an unguarded well, there is no liability resting upon him for the loss. A railroad company stands upon the same footing as any other proprietor. *Id.*
3. **RAILROAD FENCES: STATUTES CONSTRUED.** The 43rd section of the railroad law does not require railroad companies to erect and maintain fences within the limits of incorporated towns.  
The 5th section of the damage act (Wag. Stat., p. 520), does not require them to fence anywhere; but simply dispenses with proof of negligence in the first instance when animals are killed where

there are no fences, but where fences might lawfully have been erected. *Edwards v. Hannibal & St. Joseph R. R. Co.*, 567.

4. **RAILROADS: STATUTORY LIABILITY OF, FOR INJURIES TO ANIMALS.** No action can be maintained, under the 43rd section of the railroad law (Wag., Stat., p. 310), for animals killed within the limits of a town or city; in such cases, where fences have not been, but might lawfully be erected, the action should be brought under section 5 of the damage act (Wag. Stat., p. 520), which dispenses with the proof of negligence, or, the action should be brought at common law. *Elliott v. Hannibal & St. Joseph R. R. Co.*, 683.
5. **WHERE, within the limits of a town or city, lands dedicated to public use, and crossing or abutting upon the right of way of a railroad company, are occupied and used for farming purposes, such occupancy does not make it lawful for the railroad company to fence across them, and its failure to do so will not subject it to liability under the 5th section of the damage act.** *Id.*

#### FINANCIAL AGENT.

SEE PRINCIPAL AND AGENT, 3.

#### FORBEARANCE.

**CONTRACT FOR FORBEARANCE: PLEADING CONSIDERATION.** An agreement to give a debtor further time in which to make payment is an agreement for forbearance for a reasonable time.

In declaring upon a written promise to pay money made on the consideration of such an agreement, while it is not necessary to plead the consideration, yet if it is pleaded, the petition should state the time of forbearance actually extended. It is not sufficient to state that the creditor gave his debtor further time in which to pay, and did then forbear to enforce payment. *Glasscock v. Glasscock*, 627.

#### FORCIBLE ENTRY AND DETAINER.

**IN JUSTICE'S COURT.** A complaint in an action for forcible entry and detainer before a justice of the peace, not verified by affidavit, is insufficient and does not give the justice jurisdiction to try the case. *Fletcher v. Keyte*, 285.

#### FRAUD.

**ESTOPPEL.** A relinquishment of title to personal property obtained by imposition, is of no effect, and where such a relinquishment was so obtained from one who had purchased certain mules and wagons, but they were left in his possession, he was not estopped from showing the fraud as against one who subsequently advanced money on the security of the property to the former owner of it, but who neither knew of the relinquishment, nor re-

ceived possession of the property. The doctrine that where one of two innocent parties must suffer, that one must be the sufferer who gave occasion to the wrong, has no application to such a case. *Fletcher v. Drath*, 126.

#### SEE COUNTY BONDS,

#### RESCISSION, 1.

#### STATUTE OF FRAUDS.

### FRAUDULENT CONVEYANCE.

1. **VENDOR'S LIEN: DEFENSE OF FRAUDULENT CONVEYANCE.** To defeat a suit for the enforcement of a vendor's lien against land, which, since the vendor's death, his administrator has sold to pay debts of the estate, the purchaser at the administrator's sale may show that no debt was incurred by the vendee, and for this purpose will be allowed to prove that this deed was made without consideration, and in order to hinder and defraud the creditors of the vendor. *Chapman, Admr. v. Callahan*, 299.
2. **FRAUDULENT CONVEYANCE, NOT IMPEACHABLE BY WHOM.** A purchaser at administrator's sale cannot impeach a deed made by the administrator's intestate, on the ground that it was made with intent to defraud the creditors of the intestate. *Hall v. Callahan*, 316.
3. **A FRAUDULENT CONVEYANCE OF A HOMESTEAD** by the head of a family, does not produce a forfeiture of the benefits of the homestead exemption (following *Vogler v. Montgomery*, 54 Mo. 577). *The State ex rel. Meinzer v. Diveling* 375.

### GARNISHMENT.

**EXTENT OF GARNISHEE'S LIABILITY.** Process of garnishment can not be made to operate so as to annul the contracts of parties, or to subject a party to recovery by the creditor of his creditor, when the latter could not himself recover. *McPherson v. Atlantic & Pacific Railroad Co.*, 103.

### GOVERNOR.

SEE PARDON, 1, 2, 3, 4.

### GRAND JURY.

1. **GRAND JURY: SHERIFF.** It is no ground of exception in a criminal case that the grand jury, by which the defendant was indicted, was not selected in the manner prescribed by law; nor, that the record fails to show that the sheriff and his deputies took the prescribed oath before summoning the grand jury. *State v. Hart*, 208.



2. A GRAND JURY may consist of twelve men. *State v. Green*, 631.

### HABEAS CORPUS.

1. CORRECTION OF JUDGMENTS IN CRIMINAL CASES: CONSTITUTIONAL LAW. The act of March 1st, 1877, (Sess. Acts, p. 261,) requiring any court to which application is made by *habeas corpus* for the release of any prisoner confined under a sentence which is erroneous as to time or place, to sentence him to the proper place of imprisonment or for the correct length of time, authorizes the correction of erroneous sentences passed previous to that date, and is not void either as an *ex post facto* law or as retrospective in its operation. *Ex parte Bethurum*, 545.
2. JURISDICTION AND PRACTICE IN SUPREME COURT IN HABEAS CORPUS CASES. The foregoing act is not void as conferring original jurisdiction on the Supreme Court. That court has, under the constitution, original jurisdiction in *habeas corpus* cases, and the act is substantially an amendment to the *habeas corpus* act, prescribing the practice in such cases. *Ib.*

### HEAT OF PASSION.

SEE MURDER, 1.

### HEIR.

SEE LIMITATIONS, 2.

### HOMESTEAD.

1. HOMESTEAD LAW: SEC. 7 CONSTRUED. The intent of section 7 of the Homestead Act, (Wag. Stat., p. 698,) is to secure to every head of a family who had an existing estate in lands at the time of the passage of the act a homestead free from the payment of debts contracted after that date, and to secure to every such person subsequently acquiring an estate, a homestead in it free from liability for debts contracted after the date of the filing for record the deed by which the title was acquired.  
One who, prior to the passage of the act, had entered government land, received a certificate of entry, and was living with his family upon it, but had never taken out a patent, had an existing estate within the meaning of section 7, so that it could not be taken for a debt subsequently contracted. *The State ex rel. Meinzer v. Diving*, 375.
2. A FRAUDULENT CONVEYANCE OF A HOMESTEAD by the head of a family, does not produce a forfeiture of the benefits of the homestead exemption, (following *Vogler v. Montgomery*, 54 Mo. 577). *Ib.*

## HOMICIDE.

SEE MURDER, 9, 11.

## HUSBAND AND WIFE.

1. DECLARATIONS BY A WIFE, NOT EVIDENCE AGAINST HER HUSBAND. A proposal to have a criminal charge hushed up made by the wife of the accused, in his absence, is not admissible in evidence against him on a trial for the alleged offense. *State v. Jaeger*, 173.
2. ESTOPPEL BY PLEA: HUSBAND AND WIFE. A defendant in a vendor's lien case cannot, after a verdict against him upon a plea of payment, avail himself of evidence that he had never contracted to pay for the land given upon an issue of non-assumpsit made between the plaintiff and other defendants in the case; and where husband and wife are defendants, and the husband has no other interest than a tenant by the courtesy in the land of which his wife is owner, a verdict so rendered affects his interest equally with hers, although he may, in a separate answer, have pleaded non-assumpsit, and, upon trial, the plea may have been found in his favor. *Chapman, Admr. v. Callahan*, 299.
3. ESTOPPEL. Acts of a husband in respect of the lands of his wife not held as her separate estate, cannot operate an estoppel upon her. *Hall v. Callahan*, 316.
4. WHAT CONSTITUTES A VALID MARRIAGE. An agreement made in 1819 or in 1830, between parties competent to contract, that they would live together as man and wife, followed by actual cohabitation, constituted a valid marriage, without solemnization before a minister of the gospel or an officer of the law. The Territorial Laws of April 24th, 1805 and July 9th, 1806, (Terr. Laws, pp. 66, 83), and the act of the Legislature of January 4th, 1825, (Rev. Stat., 1825, p. 527), concerning marriage, contain no positive declaration that a marriage not solemnized shall be void. *Dyer v. Brannock*, 391.
5. UNLAWFUL MARRIAGE: INHERITABLE CAPACITY OF ISSUE. Under section 8 p. 328, Rev. Stat. 1825, which provides that the issue of all marriages deemed null in law \* \* shall, nevertheless, be legitimate, a child of such a marriage will inherit and transmit by descent the same as if born of a lawful marriage. *Ib.*
6. STATUTE OF LIMITATIONS. As against the heir of a married woman whose husband survives her and is entitled to an estate in her lands as tenant by the courtesy, the statute of limitation runs from the expiration of his estate and not from her death. *Ib.*
7. A JUDGMENT IN PERSONAM against a married woman, is a nullity; and this is true though she is sued as member of a mercantile firm. *Weil v. Simmons*, 617.

SEE JUDGMENT, 4.

## IMPROVEMENTS ON LAND.

SEE EQUITY, 7.

## INDICTMENT.

1. **CRIMINAL LAW: EVIDENCE.** Upon the trial of a criminal case, proof that, since the finding of the indictment, defendant was arrested in a distant State on another indictment, and that he attempted to escape, is inadmissible.  
For the purpose of showing that he has attempted to avoid the prosecution, the indictment, on which he is being tried, may be read in evidence in connection with proof that he has previously forfeited his recognizance and left the State. But the court should instruct the jury that it is admissible as evidence for this purpose only, and should not leave them to infer that in determining the guilt or innocence of defendant, they have a right to consider the fact that the grand jury has indicted him for the crime. *State v. Hart*, 208.
2. The averments contained in the indictment itself, determine its sufficiency; not those that may be found in the copy furnished the defendant. *State v. Green*, 631.
3. **RIGHT TO TRUE COPY OF: WHEN WAIVED.** The defendant has, under our statute, a right to a true copy of the indictment, 48 hours before the trial, and, if an incorrect copy is furnished, he has the right to demand a true copy, and delay the trial until it is furnished; but, if he pleads without such copy, and makes no objection for want of it, he cannot after verdict, on that account, claim a new trial. *Lisle v. State*, 6 Mo. 428, followed. *Ib.*

## INFANT.

1. **LIABILITY FOR TORTS.** An infant is liable for a tort in the same manner as an adult. *Conway v. Reed*, 346.
2. **RATIFICATION OF INFANT'S CONTRACT.** The validity of a promise by an adult to pay a debt incurred by him during his minority, is not affected by the fact that at the time of making the promise he believed himself legally liable to pay the debt, or by the fact that during his minority his curator kept him supplied with all necessities. *Ring v. Jamison, Admr.*, 424.

## INSTRUCTIONS.

1. **AN INSTRUCTION IS ERRONEOUS** which assumes as a fact that which is in issue, and which the jury are required to pass upon. *Peck v. Ritchey*, 114.
2. **REMARKS OF JUDGE IN PRESENCE OF JURY.** When illegal evidence has been admitted without objection, a remark made by the trial judge in the presence of the jury that if objection had been

made he would have excluded it, cannot be assigned for error. *Nelson v. Foster*, 381.

3. **HARMLESS ERROR.** The Supreme Court will not reverse a judgment for a faulty instruction given by the trial court, when other instructions were given which presented the case to the jury fully and fairly, and upon the facts as clearly proven the verdict was manifestly for the right party. *Ib.*
4. **WHERE** the instructions given fully embrace all that is contained in those that are refused, this court will not reverse the judgment because of such refusal. *Graham v. Pacific Railroad Co.*, 536.

SEE MURDER, 2, 6.

WILLS, 3, 4.

#### INSURANCE.

1. **LIMITATION AS TO TIME OF BRINGING SUIT.** The charter of an insurance company required all suits to be brought on policies issued by the company within twelve months from the date of loss. A policy issued to the plaintiff contained a stipulation that it was made and accepted subject to the charter, and also provided that no suit or action for the recovery of any claim by virtue of the policy should be sustained in any court, unless commenced within twelve months after the loss should occur, and should any suit or action be commenced after the expiration of twelve months, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim, any statute of limitation to contrary notwithstanding. Plaintiff brought suit on the policy more than twelve months after a loss had occurred; *Held*, that the above stipulation was operative and binding, and precluded the plaintiff from maintaining his suit. *Glass v. Walker, Assignee, &c.*, 32.
2. **INSURABLE INTEREST: UNCLE AND NEPHEW.** A policy of insurance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy and void. The mere relation of uncle and nephew does not constitute an insurable interest, to enable either to insure the life of the other; *Held*, therefore, where an uncle insured the life of his nephew for his own benefit without having any pecuniary interest in his life, that the policy was void.  
The burden of proving an insurable interest in the life of the assured lies upon him who claims the insurance. *Singleton v. St. Louis Mut. Ins. Co.*, 63.
3. **LIFE INSURANCE: EVIDENCE: SPITTING OF BLOOD.** In a suit upon a policy of insurance procured by one upon the life of another, for the purpose of showing what was the condition of the latter, when he made his application for insurance, statements made by him which were expressions of his feelings at the time are admissible in evidence, provided they were not made too long before the application to throw light upon the subject. But such statements of his as may have related to prior ill health, are not admissible.  
Parol evidence is admissible to show in what sense the term "spitting of blood" is used in an application for life insurance. *Ib.*

## INTEREST.

WHERE a note called for ten per cent. interest after maturity, and the time of payment was extended by agreement for a certain time at the rate of nine per cent.; *Held*, that after the expiration of the extended time the note would bear interest at the rate of ten per cent. *North v. Walker*, 453.

## JEOfAILS.

A JUDGMENT AGAINST A MARRIED WOMAN: UNDER THE STATUTE OF AMENDMENTS AND JEOfAILS (Wag. Stat., pp. 1034, 1036, 1037, §§ 6, 19, 20), a judgment at law against several defendants, one of whom appears by the record to be a married woman, may, in furtherance of justice, be amended by the court which rendered it, at a subsequent term, by striking out the name of the married woman and permitting the judgment to stand as against the others.

PER HOUGH, J., DISSSENTING.

SUCH a judgment is a mistake of law, and is erroneous, and can only be corrected on appeal or by writ of error; it is not an irregular judgment within the meaning of the statute authorizing judgments to be set aside by the court in which they were rendered for irregularity. *Weil v. Simmons*, 617.

## JUDGMENT.

1. FINAL JUDGMENT: APPEAL. In a suit for dower, a judgment that plaintiff should be endowed of a certain interest in specific real estate during her natural life, and that she should have and recover of defendant her costs, and have execution thereof, is not a final judgment, and from such judgment no appeal will lie. *Strickler v. Tracy*, 465.
2. NO PERSONAL JUDGMENT can be rendered against the owner of real estate for street improvements, made in front of his premises by the city (following *St. Louis v. Allen*, 53 Mo. 44). *City of Louisiana v. Miller*, 467.
3. A JUDGMENT IN PERSONAM against a married woman, is a nullity; and this is true though she is sued as member of a mercantile firm. *Weil v. Simmons*, 617.
4. A JUDGMENT AGAINST A MARRIED WOMAN: UNDER THE STATUTE OF AMENDMENTS AND JEOfAILS. (Wag. Stat., pp. 1034, 1036, 1037, §§ 6, 19, 20.) A judgment at law against several defendants, one of whom appears by the record to be a married woman, may in furtherance of justice, be amended by the court which rendered it, at a subsequent term, by striking out the name of the married woman and permitting the judgment to stand as against the others.

PER HOUGH, J., DISSSENTING.

Such a judgment is a mistake of law, and is erroneous, and can only



be corrected on appeal, or by writ of error; it is not an irregular judgment within the meaning of the statute authorizing judgments to be set aside by the court in which they were rendered for irregularity. *Ib.*

5. FINAL JUDGMENT. A judgment for costs with an order of execution but without other disposition of the case, is not a final judgment, and no writ of error lies from it, (*following Boggess v. Cox*, 48 Mo. 278). *Crockett v. Lewis*, 671.

SEE ADMINISTRATION, 10.

APPEAL, 1.

JUDICIAL SALE.

SEE NOTICE, 1.

JURISDICTION.

1. JURISDICTION, AS DETERMINED BY AGGREGATE AMOUNT OF CLAIMS SUED ON. When the jurisdiction of the court depends upon the amount in controversy, and the petition contains separate counts upon numerous special tax bills, the aggregate amount of all the bills is the test for determining the question of jurisdiction. *Hunt v. Hopkins*, 98.
2. EJECTMENT, PRACTICE IN: CHANGE OF VENUE: JURISDICTION. Unless an ejectment case is transferred by a proper order entered of record from the court of the county in which the land lies, no court in any other county can acquire jurisdiction of it; and the question of jurisdiction may be raised for the first time in the Supreme Court. *Bray v. Marshall*, 122.
3. JURISDICTION AND PRACTICE IN SUPREME COURT IN HABEAS CORPUS CASES. The act of March 1st, 1877, (Sess. Acts, p. 261,) is not void as conferring original jurisdiction on the Supreme Court. That court has, under the constitution, original jurisdiction in *habeas corpus* cases, and the act is substantially an amendment to the *habeas corpus* act, prescribing the practice in such cases. *Ex parte Bethurum*, 545.

SEE ADMINISTRATION, 3.

LIMITATIONS, 5.

JURY.

1. PRACTICE, CRIMINAL: WHAT CONSTITUTES MISCONDUCT OF THE JUDGE AT THE TRIAL: JUROR CANNOT IMPEACH THE VERDICT. After the jury had retired to consider of their verdict in a criminal case, one of their number sent a note to the judge who presided at the trial, asking advice concerning the case, to which the judge made answer in writing. He also held a conversation with a juror as to how the

jury stood upon the question of conviction, and permitted a bailiff to tell him, without rebuke, how they were divided. All these things were done in the absence of the prisoner and his counsel. *Held*, that they constituted a case of misconduct on the part of the judge, which entitled the defendant to a new trial. *Held*, also, that the juror was not a competent witness to impeach the verdict. *State v. Alexander*. 148.

2. TESTIMONY FALSE IN PART: PROVINCE OF THE JURY. If the jury believe that a witness has willfully sworn falsely as to any material fact, they are at liberty to disregard the whole of his evidence, as well those parts of it which may be corroborated by other evidence as those which are uncorroborated. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

SEE GRAND JURY, 1.

PRACTICE, CRIMINAL, 5.

PRACTICE IN SUPREME COURT, 2

WAIVER, 2.

#### JUSTICE'S COURT.

FORCIBLE ENTRY AND DETAINER. A complaint in an action for forcible entry and detainer before a justice of the peace, not verified by affidavit, is insufficient, and does not give the justice jurisdiction to try the case. *Fletcher v. Keyte*, 285.

#### LACHES.

1. WHEN a contract has been made between an administrator and a creditor of the estate for the extension of a promissory note executed by the intestate, the creditor is not guilty of laches in not exhibiting and making application for the allowance of his claim against the estate within the term to which the payment has been extended, and the creditor cannot, therefore, invoke against him the statutory bar created by sections 2 and 6, article 4 of Wagner's Statutes. *North v. Walker, Admr.*, 453.
2. EFFECT OF DELAY IN RAISING JURISDICTIONAL QUESTION: STATUTE OF LIMITATIONS. When the defendant has neglected to raise the question whether the trial court had jurisdiction, until a late stage of a prolonged litigation, in the progress of which a judgment against him has been affirmed in the Supreme Court, that court will decline, on a second appeal, to examine the question, if the result of a ruling adverse to the jurisdiction would be to enable the defendant to interpose the statute of limitations as a bar against plaintiff's demand in a new action. *Boone v. Shackelford*, 493.

#### LANDS AND LAND TITLES.

1. DEED OF TRUST, POWERS OF GRANTOR IN. One who gives a deed of

trust upon land cannot afterwards make any agreement concerning the same to the prejudice of the title conveyed by the deed. A subsequent contract with a stranger permitting him to inclose and use part of the land, is void as against a purchaser at a sale under the deed of trust. *Sims v. Field*, 111.

2. **LAND ENTRIES: RESULTING TRUSTS.** If one owning a government land-warrant issued in the name of another, and not assigned by him, enters land under the warrant for himself, but for want of the assignment makes the entry in the name of the other, the latter takes the legal title to the land as trustee for the former. *Key v. Jennings*, 356.

SEE EQUITY, 1.

LICENSE, 3, 4.

#### LANDLORD AND TENANT.

**CONTRACT: TAXES.** Where by the terms of a lease the lessee was entitled, from time to time, to deduct from the rental all taxes imposed upon the leased property, which the lessee either had paid or might be liable to pay, and there was at the time no law imposing a personal liability for taxes on any one, but any taxes levied upon the property were a lien upon it; *Held*, that the stipulation amounted to an appropriation of a reserved fund out of the rental to the payment of the taxes. *McPherson v. Atlantic and Pacific Railroad Co.*, 103.

SEE LICENSE, 3, 4.

#### LARCENY.

1. **REMOVAL OF STOLEN PROPERTY INTO ANOTHER COUNTY.** Each asportation of stolen property from one county into another, is a fresh theft. An indictment for stealing a mare in Greene county, therefore, is supported by evidence that she was stolen by defendant in Laclede county, and subsequently carried by him into Greene. *State v. Preston G. Smith*, 61.
2. **STATUTES CONSTRUED.** By section 25, chapter 201, General Statutes of 1865, the stealing of property of the value of ten dollars or more, constituted grand larceny; and by section 27 the stealing of property under the value of ten dollars, constituted petit larceny. By the act of March 1st, 1877, (Sess. Acts 1877, p. 241,) these sections were amended by raising the value necessary to constitute grand larceny to twenty dollars, and by making the stealing of less than twenty dollars petit larceny. A person indicted for stealing property of the value of ten dollars before the passage of the act of 1877, pleaded guilty after the act took effect, and was sentenced to two years imprisonment in the penitentiary, the penalty prescribed for grand larceny. An act in force at the time the offense was committed, (Wag. Stat., 895, § 6) provided that "no offense committed, and no penalty \* \* incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses and the

recovery of such penalties \* \* shall be had in all respects as if the provision had remained in force."

*Held*, 1st, That section 6 applies as well to cases where a statute has been amended as where it has been absolutely repealed;

2nd, That the act of 1877 is, by its terms, prospective, and does not apply to offenses previously committed;

3rd, That the sentence as for grand larceny was therefore proper. *The State ex rel. Houston v. Willis*, 131.

3. AUTREFOIS ACQUIT: LARCENY OF MONEY, NATIONAL BANK NOTES: EVIDENCE. A plea of *autrefois acquit* to an indictment for stealing a national bank note, is sustained by proof of an acquittal upon an indictment for stealing money accompanied by evidence that both indictments were for the same act.

Under Sec. 31, p. 1091, Wag. Stat., evidence of the theft of the note was admissible in support of the indictment for stealing money, (*overruling State v. Kroeger*. 47 Mo. 530). *The State v. Moore*, 372.

# LEASE.

SEE LICENSE, 4.

MISNOMER, 1.

# LEGITIMACY.

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# LICENSE.

1. ESTOPPEL AGAINST EXERCISE OF CORPORATE POWERS: MUNICIPAL POWER OVER STREETS: LICENSE. A railroad company which has, by its charter, a general power to build its road along or across the streets of a city, is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city authorities, an ordinance permitting it to lay and use a track on that street for a limited time, and has actually laid and used it, as permitted by the ordinance. The city has no power to authorize the use of any street for a railroad. Such an ordinance is, therefore a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license. *Id.*
2. If a railroad company, having built a track upon a street of a city under a license from the city, subsequently tears up the track and surrenders possession of the street to the city, the fact that it has once accepted such license will not estop it from asserting a power to build on that street, which was given by its charter, and was in existence when it accepted the license. *Id.*
3. MINING LICENSE: COVENANTS. An instrument in writing, under seal, granting permission to mine on a certain lot, so long as the grantees do regular mining work on the lot, is a license, and a grant

of an incorporeal hereditament, which is not revocable except for breaches thereof by the grantee, and contains, in effect, a covenant, on the part of the grantor, that the grantee, in respect to his mining privilege, shall be free from the interruptions or claims of others. *Boone v. Stover*, 430.

4. LEASE. Such an instrument is not a lease, for the reason that it does not pass such an estate in possession in the land, as would entitle the grantee to maintain ejectment. *Ib.*

#### LIEN.

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#### LIMITATIONS.

1. ADVERSE POSSESSION. When adverse possession is such that it may be presumed that the true owner had knowledge of it, and has acquiesced in it, or, if the indications of the claim and possession are so patent and so open that, if he remained in ignorance, it must have been his own fault, he will be barred, provided that the adverse possession has been continued for the requisite length of time. *Key v. Jennings*, 356.
2. STATUTE OF LIMITATIONS. As against the heir of a married woman whose husband survives her and is entitled to an estate in her lands as tenant by the courtesy, the statute of limitation runs from the expiration of his estate and not from her death. *Dyer v. Brannock*, 391.
3. LIMITATION AGAINST RUNNING ACCOUNT. When it is fairly inferable from the conduct of the parties to a running account while it is accruing, that the whole is to be regarded as one account, none of the items are barred by the statute of limitations, unless all are (*following Madison Coal Co. v. Steamboat Colona*, 36 Mo. 446 and other cases). *Ring v. Jamison, Admr.*, 424.
4. POWER OF ADMINISTRATOR TO OBTAIN EXTENSION OF NOTES. An administrator has the legal power to contract for the extension of the time of payment of a note executed by his testator, so long as it is not barred under the administration law. *North v. Walker's Admr.*, 453.
5. EFFECT OF DELAY IN RAISING JURISDICTIONAL QUESTION: STATUTE OF LIMITATIONS. When the defendant has neglected to raise the question whether the trial court had jurisdiction, until a late stage of a prolonged litigation, in the progress of which a judgment against him has been affirmed in the Supreme Court, that court will decline, on a second appeal, to examine the question, if the result of a ruling adverse to the jurisdiction would be to enable the defendant to interpose the statute of limitations as a bar against plaintiff's demand in a new action. *Boone v. Shackleford*, 493.

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3. PLEADING MALICE. In a case where malice is the gravamen of the action, the petition will be held bad on demurrer, if the facts as detailed in it show that there was no malice, notwithstanding it contains a general charge that defendant's acts were willful, malicious and oppressive. *Drift v. Snodgrass*, 286.

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**RAILROAD DAMAGES: PLEADING.** A railroad company is not liable under the 5th section of the damage act (Wag. Stat., p. 520), for stock killed by one of its locomotives which was at the time being used by a servant of the company without authority, for his own purposes, and outside of the line of his employment.

This defense need not be specially pleaded, but may be given in evidence under the general issue. *Cousins v. Hannibal & St. Joseph R. R. Co.*, 572.

## MAXIMS.

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## MINING LICENSE.

1. **COVENANTS.** An instrument in writing, under seal, granting permission to mine on a certain lot, so long as the grantees do regular mining work on the lot, is a license, and a grant of an incorporeal hereditament, which is not revocable except for breaches thereof by the grantee, and contains, in effect, a covenant, on the part of the grantor, that the grantee, in respect to his mining privilege, shall be free from interruptions or claims of others. *Boone v. Stover*, 430.
2. **LEASE.** Such an instrument is not a lease, for the reason that it does not pass such an estate in possession in the land, as would entitle the grantee to maintain ejectment. *Id.*

## MISNOMER.

**MISNOMER OF INSTRUMENT SUED ON: VARIANCE.** In an action for breach of covenant for quiet enjoyment contained in an instrument designated in the petition as a lease, but of whose contents the defendant is fully apprised, if the instrument, when produced on the trial appears to be not a lease but a mining license, an amendment of the petition may properly be made, but there is no such variance between the allegation and the proof as to authorize a non-suit. *Boone v. Stover*, 430.

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## MISTAKE.

**POWER OF A COURT OF EQUITY TO REFORM CONTRACTS.** A court of equity will order a contract to be reformed so as to make it speak the actual agreement of the parties, when satisfied, that by mistake in reducing it to writing, property has been transferred which it was not the intention of either should be included in the contract—and this in a case where the complainant himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of words, or through sheer carelessness. But where it appears that the complainant has been guilty of such breaches of the real contract as substantially to deprive the other party of all its benefits, the reformation will be ordered only on condition that the parties be put, as nearly as may be, in *statu quo*; as by the return of all moneys received by the complainant under the contract. *Cassidy v. Metcalf*, 519.

## MUNICIPAL BONDS.

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## MUNICIPAL CORPORATION

1. **RIGHT OF INDIVIDUALS AND THE STATE TO DISPUTE THE EXERCISE OF CORPORATE FRANCHISES.** Individuals may resist the condemnation of their lands for a right of way for a railroad, after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road after the expiration of that time, over a right of way already acquired; and a city is an individual within the meaning of this rule, so that where a railroad company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets, on the ground that the time limited by charter for the completion of the road has expired. The State alone can proceed against the company to arrest the work on that ground. *Atlantic and Pacific R. R. Co. v. City of St. Louis*, 228.
2. **ESTOPPEL AGAINST EXERCISE OF CORPORATE POWERS: MUNICIPAL POWER OVER STREETS: LICENSE.** A railroad company which has, by its charter, a general power to build its road along or across the streets of a city, is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city authorities, an ordinance permitting it to lay and use a track on that street for a limited time, and has actually laid and used it, as permitted by the ordinance. The city has no power to authorize the use of any street for a railroad. Such an ordinance is, therefore a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license. *Id.*
3. If a railroad company, having built a track upon a street of a city under a license from the city, subsequently tears up the track and surrenders possession of the street to the city, the fact that it has

once accepted such license will not estop it from asserting a power to build on that street, which was given by its charter, and was in existence when it accepted the license. *Ib.*

4. **CONTRACTS OF PUBLIC CORPORATIONS: RATIFICATION OF, BY STATE.** The General Assembly, by an act passed in December, 1855, enacted, "that all contracts made by the trustees of the town of New Franklin, for the purpose of raising the amount authorized in the act of incorporation, be, and the same are hereby declared to be legal, and may be carried out according to the true intent and meaning of the parties thereto." At the time of the passage of this act, but two contracts had been made by the trustees, one in 1842, the other in 1849; and long prior to its passage, the contract of 1842 had been declared valid by the judgment of this court; *Held*, that the State, by the act, intended to remove doubts as to the validity of the contract made by the trustees in 1849, and thereby ratified the same; and that a subsequent ratification by the State of a contract made by one of its own agencies is equivalent to a previous authorization. *The State ex rel. Attorney General v. Miller*, 328.
5. ———: ———: **VESTED RIGHTS UNDER.** Public corporations are the auxiliaries of the State in municipal government, and neither their existence nor their privileges, rest upon anything like a contract between them and the legislature; but, when such a corporation, by authority of the State, contracts with a third person, whereby rights become vested in such person, they cannot be divested by the State; such a contract becomes, *pro hac vice*, the contract of the State, and if imperfectly made, can be validated by it, and, when so validated, cannot be violated by the State. *Ib.*
6. ———: **MODIFICATION OF, WHEN VALIDATED BY LEGISLATIVE ACT: SUCH ACT NOT OBNOXIOUS AS A RETROSPECTIVE LAW.** The act of 1855 is not obnoxious to the constitutional objection that it is retrospective in its operations; the State, as one of the contracting parties, had the same right to consent to the modification of the contract made in 1849, as it had to confer original authority on the town of New Franklin through its trustees to enter into the contract of 1842. *Ib.*
7. ———: **VESTED RIGHTS UNDER: WHEN THEY CANNOT BE DIVESTED BY QUO WARRANTO.** When the State, through the agency of a public corporation, makes a contract with a third person, and such contract imposes no obligation upon such person to look to the application of the money to be paid by him under such contract, it cannot, by a proceeding by *quo warranto* forfeit and take away the right of the assignees of such person, because such corporation does not apply the funds realized to the object for which they were intended. *Ib.*
8. **STREET IMPROVEMENTS.** The engineer of a city which has power by its charter to provide by ordinance for the construction and repair of sidewalks, has no authority to order a sidewalk to be built without an ordinance. *City of Louisiana v. Miller*, 467.
9. **NO PERSONAL JUDGMENT** can be rendered against the owner of real estate for street improvements, made in front of his premises by the city, (following *St. Louis v. Allen*, 53 Mo. 44.) *Ib.*
10. **MUNICIPAL POWER OF TAXATION: UNIFORMITY AND EQUALITY.** A city which is authorized by its charter to license, tax and regulate

merchants, agents, express companies, insurance companies, &c., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city, and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike. *American Union Express Co. v. City of St. Joseph*, 675.

11. **MUNICIPAL TAX ON EXPRESS COMPANIES: ESTOPPEL** A tax imposed by city ordinance upon the gross receipts of an express company as a compensation for the transaction of its business in the city, is properly collected from the gross earnings without deduction for expenses incurred in conducting the business.

If a part of the gross receipts have been paid out to other companies as their *pro rata* for carrying freight, although in strictness the amounts so paid may not be liable to taxation under the ordinance, yet when they are embraced in the return made by the company itself, and the tax has been paid on the whole, though under protest, it cannot be recovered back.

#### SEE SPECIAL TAXES, 1.

### MURDER.

1. **MURDER IN THE SECOND DEGREE** is the wrongful killing of a human being with malice aforethought, but without deliberation. It is where the intent to kill is, in a heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside.

**Heat of Passion.** This phrase is here used, not in its technical sense, but to denote a condition of mind contra-distinguished from a cool state of the blood.

**Malice aforethought.** Malice is the intentional doing of a wrongful act without just cause or excuse. As an element of the crime of murder malice aforethought signifies that the homicide has been intentionally committed with malice.

**Deliberation** does not mean brooded over, considered, reflected upon for a week, a day or an hour, but it means an intent to kill, executed, not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose. *State v. Wieners*, 13.

2. **CASE ADJUDGED.** It having been clearly proven that defendant killed deceased intentionally, that there was no excuse or justification for the killing, that the provocation given by deceased was slight, and that deceased explained and apologized to defendant for it, it was held that it was not a case requiring instructions to be given to the jury defining murder in the second degree, and there being no complaint against the instructions in regard to murder in the first degree given by the trial court, the judgment of conviction was affirmed. *Ib.*
3. **EVIDENCE: THE BONES OF THE DEAD MAN** may be exhibited in evidence upon a trial for murder, for the purpose of showing to the



jury the attitudes and relative positions of the deceased and defendant, when the fatal shot was fired.

4. **AN INDICTMENT FOR MURDER**, which fails to state where or in what year the deceased died, is bad. *State v. Mayfield*, 125.
5. **EVIDENCE: RES GESTAE.** A homicide occurred about eleven o'clock at night; the testimony of defendant's mother was to the effect that defendant came to the house on the same night between eleven and twelve o'clock, and aroused her from sleep, when she got up and let him in; that he had blood on his face and hands, and told her he had had a difficulty with a student, and had cut him; that he had a knife in his hands with blood on it; except from this testimony, it did not appear how much time had intervened between the cutting and the arrival of defendant at his mother's house, and it did not appear how far she lived from the scene of the homicide; defendant's counsel proposed to identify the knife by the mother, to which the State objected, and the objection was sustained, on the ground that there was no evidence tending to show that the killing was done with the knife proposed to be identified; *Held*, that the objection was properly sustained upon the ground, if no other, that defendant had ample time and opportunity between the occurrence of the difficulty and his arrival at his mother's house to cast away, or conceal the instrument with which the cutting was done, and substitute the knife in question in its stead. *State v. Christian alias White*, 138.
6. **HARMLESS ERROR IN INSTRUCTIONS: MURDER.** Defendant sustains no injury from erroneous instructions relating to murder in the first degree, where he is only convicted of murder in the second degree; and for the giving of such instructions the judgment will not be reversed. *Ib.*
7. **REASONABLE DOUBT.** Instructions, relating to the question of reasonable doubt, are objectionable, if the jury are not told what a reasonable doubt is. They are also objectionable, if they instruct the jury that, if they have a reasonable doubt as to the evidence of any fact necessary to make up the offense, they must acquit; the accused is only entitled to an instruction relative to the consequences of a reasonable doubt as to his guilt on the whole evidence in the case, and has no right to select a single material fact, and ask the court to direct the jury that, if they have a doubt as to the existence of such fact, they must acquit. *Ib.*
8. **MANSLAUGHTER: AGREED COMBAT: SELF-DEFENSE.** When all the facts in the case show that the defendant sought and brought on the difficulty, which resulted in the death of his adversary, he is not entitled to have the court instruct the jury in relation to manslaughter; nor can he avail himself of the right of self defense, however imminent the danger in which he may have found himself in the progress of the affray; and when parties, by mutual understanding, engage in a conflict, and death ensues to either, the slayer will be guilty of murder; and although, when the combat is the immediate consequence of a sudden quarrel, and not an act of deliberation or agreement, the slayer may not be guilty of murder, yet, if he, under color of fighting upon equal terms, uses from the beginning of the contest a deadly weapon, without the knowledge of the other, and kills, or when at the beginning he prepares a

deadly weapon, so as to have the power of using it in some stage of the contest, and does use it, and kills the other party with it, the killing will amount to murder. *Ib.*

9. **HOMICIDE WITH A DANGEROUS WEAPON: MALICE: REASONABLE DOUBT.** If one intentionally kills another with a dangerous weapon, the law presumes that the killing is malicious, and it devolves upon the slayer to adduce evidence to meet or repel that presumption. If he succeeds in adducing sufficient evidence to create in the minds of the jury a reasonable doubt of his guilt, he is entitled to an acquittal. *State v. Alexander*, 148.
10. **INTENTIONAL HOMICIDE: INSTRUCTIONS.** Where the uncontradicted evidence shows that a homicide was intentionally committed and the only question in the case is whether the act was done in self-defense or not, it is error for the court to give the jury an instruction based upon the hypothesis of a killing without a design to effect death. *Ib.*
11. **EVIDENCE OF THREATS.** Upon a trial for murder, evidence of threats made by deceased against defendant, is not admissible to justify the killing, but is admissible as conducing to show that an assault was first made by deceased upon defendant, when there is other evidence tending to prove such assault. When there is none such, evidence of threats is not admissible for any purpose. *Ib.*
12. **REASONABLE DOUBT: MURDER.** In a criminal prosecution the State must establish the guilt of the accused beyond a reasonable doubt, upon a view of the whole evidence. The case is not divided into two parts, one of guilt asserted by the State, the other of innocence asserted by the accused. There is no shifting of the burden of proof; it remains upon the State throughout the trial. An instruction is, therefore, erroneous which declares that if defendant shot and killed the deceased, the law presumes that it is murder in the second degree, in the absence of proof to the contrary; and it devolves upon the defendant to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense.  
Such an instruction is especially objectionable when the court fails to give the jury a proper instruction as to reasonable doubt. *State v. Wingo*, 181
13. When the evidence for the State, upon a trial for murder, raises the question whether defendant was acting in self-defense when he committed the homicide, it is error to give the jury an unqualified instruction that if he willfully shot and killed deceased, they should find him guilty of murder in the second degree. *Ib.*
14. **MURDER OF OFFICER: EVIDENCE.** Under an indictment for murder in the ordinary form, proof may be made that the deceased was an officer, regularly appointed and qualified, and that he was acting within his jurisdiction, and in the discharge of his duty when killed. *State v. Green*, 631.
15. **KILLING OF OFFICER: OFFENSE AT COMMON LAW, UNDER THE STATUTE.** At common law, where an officer, having authority to arrest, whether it be for misdemeanor or felony, and using the proper

means for that purpose, is resisted and killed, it is murder in all who take part in such resistance.

Under the statute, (Wag. Stat., p. 445, Sec. 1,) it is murder in the first degree only when the person whose arrest is attempted, is charged with the commission of a felony. *Ib.*

16. MURDER IN FIRST DEGREE. Willfulness, deliberation and premeditation are not elements necessary to constitute a homicide committed in the perpetration, or attempt to perpetrate a felony, murder in the first degree. *Ib.*
17. MURDER: MANSLAUGHTER: INSTRUCTIONS. Where an officer of the law, provided with a legal warrant of arrest, reads the same to the person whose arrest is ordered, and informs him of the offense with which he is charged, and attempts to execute the warrant in a lawful manner, and, while so doing, is shot down by such person with out provocation, either by word or act, and the killing is deliberately and premeditatedly done; *Held*, not to present a case for instructions in regard to murder in the second degree, nor in regard to manslaughter in any of its degrees. *Ib.*

#### NEGLIGENCE.

1. CHARGE OF UNLAWFUL SHOOTING, SUSTAINED BY PROOF OF NEGLIGENT SHOOTING. Under the present practice, proof of a negligent or careless shooting will sustain an allegation of an unlawful and wrongful shooting; the same was true, at common law, where an action of trespass for assault and battery was the proper form of action for direct injuries negligently and carelessly inflicted, as well as for those that were intentional and malicious. *Conway v. Reed*, 346.
2. FORTY-THIRD SECTION OF THE RAILROAD LAW: NEGLIGENCE. In an action under the 43rd section of the railroad law (Wag. Stat., p. 310), there can be no recovery for injuries resulting from the negligent management of a train, (following *Cary v. St. L., K. C. & N. Rwy. Co.*, 60 Mo. 209). *Edwards v. Hannibal and St. Joseph R. R. Co.*, 567.

SEE EQUITY, 3.

NEGLIGENTLY COMPOUNDING MEDICAL PRESCRIPTION.

RAILROAD, 15.

#### NEGLIGENTLY COMPOUNDING MEDICAL PRESCRIPTION.

AN indictment under Sec. 18, p. 447, Wag. Stat., against a druggist for manslaughter in negligently filling a medical prescription with opium by reason of which the person to whom it was administered died, failed to charge that defendant delivered the medicine to any one to be administered to deceased, or to state what were the ingredients named in the prescription, or the respective quantities of the several ingredients, or by whom the medicine was prescribed; *Held*, that these were essential averments, and without them the indictment was defective. *State v. W. H. Smith*, 92.

## NEPHEW AND UNCLE,

SEE INSURANCE, 2.

## NEW FRANKLIN.

SEE STATE EX REL. ATTORNEY GENERAL V. MILLER, 328.

## NON EST FACTUM.

PERJURY IN MAKING AFFIDAVIT OF NON EST FACTUM. An indictment for perjury, charged to have been committed by defendant in making an affidavit denying the execution of a promissory note in a suit wherein he was sued upon the note, is bad, unless it shows that an issue of *non est factum* was raised by answer. An averment that defendant made the execution of the note a material issue, or that it then and there became material to inquire and ascertain whether he did execute it only states a legal conclusion and is insufficient. *State v. Shanks*, 560.

## NORMAL SCHOOL,

SEE SCHOOL, 2.

## NOTICE.

1. UNITED STATES INTERNAL REVENUE: COLLECTOR'S NOTICE OF SALE. When the owner of land, on account of which a United States succession tax has been assessed, resides in the same collection district with the land, but not upon it, a collector's notice of seizure and sale of the same to pay the tax, is not lawfully served upon him by leaving a copy at the domicile on the land. *Peyrie v. Schreiber, et al.*, 38.
2. PURCHASE WITH NOTICE: TRUSTEE: ESTOPPEL. Defendants' grantor entered a tract of government land, and took from the receiver of the local land office a receipt for the purchase money, describing the land. By a mistake of the officer the records of the General Land Office at Washington were made to show an entry of a different tract, and a patent was issued accordingly. The records of the local office were afterwards destroyed by fire. Without taking actual possession defendants' grantor claimed to be the owner of the tract designated in the receipt. Nevertheless, for a period of seventeen years he permitted the other tract to be assessed to him for taxation, and during a part of the time at least, paid the taxes on it. The tract described in the receipt never was assessed to him. Plaintiff knew that defendants' grantor had intended to enter that tract, and that he claimed title to it. Finding, however, that the government records showed it to be vacant and subject to entry, plaintiff purchased and obtained a patent for it in his own name. Neither the defendants nor their grantor ever took any step to have the mistake corrected until after the issue of the patent to plaintiff:

*Held*, 1st, That these facts were not sufficient to put plaintiff on inquiry, or to affect him with notice of a title in defendants, or to constitute him a trustee for them; 2d, That defendants had acquiesced in the entry as made, and were estopped to claim title to the other tract.

#### NAPTON AND NORTON, JJ., DISSENTING.

*Held*, that the question which tract defendants' grantor had in fact entered, was a judicial question. that the decision of the land officers of the government and the issuing to him of the patent for the other tract was not conclusive on him or his grantees, and that plaintiff took the title as trustee for them. *Sensenderfer v. Smith*, 80.

3. ARREST: NOTICE OF OFFICER'S AUTHORITY, WHAT SUFFICIENT. An officer duly appointed and qualified, and authorized by a warrant to arrest any offender, gives sufficient notice of his authority to do so by reading to him the warrant of arrest. *State v. Green*, 631.

#### SEE CONSIGNOR AND CONSIGNEE.

#### DEED OF TRUST, 2, 4, 7.

#### ELECTION, 1.

#### PROMISSORY NOTE, 4.

#### OBTAINING GOODS UNDER FALSE PRETENSES.

1. AN indictment for obtaining goods under false pretenses, alleging several matters, one of which may not be in legal contemplation a false pretense, because it relates to something to be done in the future, is not vitiated thereby, if the others are such false pretenses as our statute contemplates. *State v. Vorback*, 168.
2. An allegation in such an indictment that the person, to whom such false pretenses were made, believing the same, and being deceived thereby, was induced, by reason thereof, to deliver, &c., is sufficient averment that such person believed the false pretenses to be true. *Ib.*

#### OFFICER.

1. KILLING OF OFFICER: OFFENSE AT COMMON LAW, UNDER THE STATUTE. At common law, where an officer having authority to arrest, whether it be for misdemeanor or felony, and using the proper means for that purpose, is resisted and killed, it is murder in all who take part in such resistance.  
Under the statute, (Wag. Stat., p. 445, Sec. 1,) it is murder in the first degree only when the person whose arrest is attempted, is charged with the commission of a felony. *State v. Green*, 631.
2. INDICTMENT FOR MURDER: EVIDENCE. Under an indictment for murder in the ordinary form, proof may be made that the deceased was



an officer, regularly appointed and qualified, and that he was acting within his jurisdiction, and in the discharge of his duty when killed. *Ib.*

3. THE DUTIES OF A DEPUTY MARSHAL being defined by law, he may execute a warrant placed in his hands without special instructions from his principal. *Ib.*
3. ARREST: NOTICE OF OFFICER'S AUTHORITY, WHAT SUFFICIENT. An officer duly appointed and qualified, and authorized by a warrant to arrest any offender, gives sufficient notice of his authority to do so by reading to him the warrant of arrest. *Ib.*

## PARDON.

1. PARDON OR COMMUTATION: WHEN EXECUTED, NOT REVOCABLE. A pardon or commutation of sentence takes effect, and the recipient of executive clemency cannot be deprived of its benefits and immunities by a subsequent revocation, when it has been signed by the Executive, properly attested, authenticated by the seal of the State, and delivered either to the recipient, or to some one acting for him, or on his behalf. *Ex parte Reno, 266.*
2. CONSTRUCTIVE DELIVERY OF A PARDON. Delivery of a pardon by the Governor to one suing for the release of a prisoner confined in the State penitentiary, is constructive delivery to the prisoner. *Ib.*
4. PARDON NOT VOID BECAUSE NOT REGISTERED. A pardon or commutation of sentence is not void because there is no entry made of it in the office of the Secretary of State, although he is required by law to keep a register of the official acts of the Governor. *Ib.*
4. CONDITIONAL PARDON. Under the Constitution of 1865, the Governor had power to grant a conditional pardon, but the conditions, to be operative, should appear on the face of the paper. *Ib.*

## PARTIES.

1. WHO ARE PROPER PARTIES TO A VENDOR'S LIEN SUIT. An administrator sold and conveyed several parcels of land, part of a larger tract, and received the purchase money for the same. His intestate had previously conveyed the entire tract to another party. In a suit by the administrator to enforce a vendor's lien against the entire tract for the purchase money due upon this sale; *Held*, that the purchasers at the administration sale were proper parties defendant. *Chapman, Admr. v. Callahan, 299.*
2. INCOMPETENCY OF A SURVIVING PARTY AS A WITNESS. Where one of the original parties to the contract or cause of action in issue and on trial, is dead, the other is not a competent witness, even for the purpose of rebutting testimony given by the adverse party to show admissions made by himself since the death of the deceased. *Ring v. Jamison, Admr., 424.*
3. PRACTICE: NEW PARTIES. An objection to the action of the trial

court admitting a new party to a suit comes too late, if made for the first time when the case has reached the Supreme Court. *Weil v. Simmons*, 617.

#### PARTNERSHIP.

1. **DEATH OF PARTNER.** Death, ordinarily, accomplishes the dissolution of a partnership; but it is otherwise when there is an express stipulation to the contrary in the articles of copartnership. *Edwards v. Thomas*, 468.
2. **AGENCY: POWERS OF CASHIER AND FINANCIAL AGENT.** One who is authorized to act as cashier and financial agent of a firm which is in the habit of taking commercial paper in the transaction of its business, has authority to endorse such paper in the name of the firm. *Id.*
3. **NOTICE OF PROTEST.** It is the duty of the holder of dishonored paper to direct the notary where and to whom to send notice of protest; and if one holding such paper endorsed by a firm, knows that the former manager of the business of the firm has been displaced by another, but fails to inform the notary of the change, and the notary gives notice of protest to the former manager at the old place of business, as he had done on a previous occasion, such notice is insufficient to bind the firm, notwithstanding the failure of the new manager to give notice that the business of the firm is no longer conducted at that place, and to remove the old sign of the firm. *Id.*
4. **DISTRIBUTION OF PARTNERSHIP ASSETS.** A partner sold his interest in the firm to his co-partner, who agreed to pay the firm debts. The firm was at the time insolvent. After the sale the continuing partner gave a deed of trust on all the assets of the late firm to secure the payment of an individual indebtedness of his own, which accrued prior to the dissolution. In a contest between a creditor of the firm and the individual creditor, *Held*, that the right of the former to be paid out of the firm assets in preference to the latter was not impaired by the dissolution, and as against him the deed of trust was a nullity. *Phelps v. McNeely*, 554.
5. **EQUITY JURISDICTION TO OPEN SETTLEMENTS: PLEADING.** An action to open a settlement of joint account transactions cannot be maintained, if it appears that the plaintiff was aware, when he made the settlement, of the facts on which he bases his claim to relief; and this is true although that defense is not set up in the answer. *Quinlan v. Keiser*, 603.
6. **A JUDGMENT IN PERSONAM against a married woman, is a nullity; and this is true though she is sued as member of a mercantile firm.** *Weil v. Simmons*, 617.

#### PAYMENT.

SEE CONTRACT, 9.

## PERJURY.

**PERJURY IN MAKING AFFIDAVIT OF NON EST FACTUM.** An indictment for perjury, charged to have been committed by defendant in making an affidavit denying the execution of a promissory note in a suit wherein he was sued upon the note, is bad, unless it shows that an issue of *non est factum* was raised by answer. An averment that defendant made the execution of the note a material issue, or that it then and there became material to inquire and ascertain whether he did execute it only states a legal conclusion, and is insufficient. *The State v. Shanks*, 560.

## PERSONAL INJURIES.

1. **PRIMA FACIE CASE.** In an action for damages, sustained from injuries caused by an unlawful and wrongful assault and shooting, plaintiff is *prima facie* entitled to a verdict upon proof that he was shot by defendant, it then devolves upon the defendant to show that the shooting occurred without fault on his part, or to put in evidence mitigating facts, it is not necessary that plaintiff, in the first place and by direct evidence, should show either an intention to commit the injury or that defendant was in fault. *Conway v. Reed*, 346.
2. **DISEASE AS AFFECTING LIABILITY FOR PERSONAL INJURIES.** The liability of a railroad company for a violent ejection of a passenger from its train, is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.
3. **EVIDENCE: COMPLAINTS OF PHYSICAL PAIN** made by one suffering from a recent injury, are admissible in evidence on behalf of the sufferer in an action to recover damages for the injury. *Ib.*

## PERSONAL PROPERTY.

**CAVEAT EMPTOR; APPLICABLE WHERE PERSONAL PROPERTY IS NOT IN POSSESSION OF THE PARTY CLAIMING SAME.** The doctrine of *caveat emptor* applies to one advancing money and taking a deed of trust upon personal property not in the possession of the grantor in the deed of trust, but in the possession of a third party. *Fletcher v. Drath*, 126.

## PLEADING.

1. **PLEADING MALICE.** In a case where malice is the gravamen of the action, the petition will be held bad on demurrer, if the facts as detailed in it show that there was no malice, notwithstanding it contains a general charge that defendant's acts were willful, malicious and oppressive. *Dritt v. Snodgrass*, 286.
2. **EQUITY JURISDICTION TO OPEN SETTLEMENTS: PLEADING.** An action to open a settlement of joint account transactions cannot be maintained, if it appears that the plaintiff was aware, when he made the

settlement, of the facts on which he bases his claim to relief; and this is true although the defense is not set up in the answer. *Quinlan v. Keiser*, 603.

3. PLEADING CONSIDERATION OF A NOTE. In declaring upon a written promise to pay money, it is not necessary to aver a consideration for the promise, but if one be averred, it must be a good consideration; otherwise the petition will be demurrable. *Glasscock v. Glasscock*, 627.

4. CONTRACT FOR FORBEARANCE: PLEADING CONSIDERATION. An agreement to give a debtor further time in which to make payment is an agreement for forbearance for a reasonable time.

In declaring upon a written promise to pay money made on the consideration of such an agreement, while it is not necessary to plead the consideration, yet if it is pleaded, the petition should state the time of forbearance actually extended. It is not sufficient to state that the creditor gave his debtor further time in which to pay, and did then forbear to enforce payment. *Id.*

SEE EQUITY, 7.

ESTOPPEL, 1.

FORCIBLE ENTRY AND DETAINER.

JURISDICTION, 1.

MALICE, 3.

MASTER AND SERVANT, 1.

MISNOMER, 1.

SPECIAL TAXES, 1.

VENDOR'S LIEN, 2, 4.

#### PLEADING, CRIMINAL

1. OBTAINING GOODS UNDER FALSE PRETENSES. An indictment for obtaining goods under false pretenses, alleging several matters, one of which may not be in legal contemplation a false pretense, because it relates to something to be done in the future, is not vitiated thereby, if the others are such false pretenses as our statute contemplates. An allegation in such an indictment that the person to whom such false pretenses were made, believing the same, and being deceived thereby, was induced, by reason thereof, to deliver, &c., is a sufficient averment that such person believed the false pretenses to be true. *The State v. Vorback*, 168.
2. INDICTMENT, CAPTION OF. An objection to an indictment that it purports to have been found in a court which never existed, based solely upon the name given to the court in the caption of the indictment, will not be regarded, where the record shows that the

indictment was returned to a court of whose existence judicial notice can be taken. *State v. Daniels*, 192.

3. **PERJURY IN MAKING AFFIDAVIT OF NON EST FACTUM.** An indictment for perjury, charged to have been committed by defendant in making an affidavit denying the execution of a promissory note in a suit wherein he was sued upon the note, is bad, unless it shows that an issue of *non est factum* was raised by answer. An averment that defendant made the execution of the note a material issue, or that it then and there became material to inquire and ascertain whether he did execute it only states a legal conclusion and is insufficient. *The State v. Shanks*, 560.
4. **INDICTMENT: SUFFICIENCY OF.** The averments contained in the indictment itself, determine its sufficiency; not those that may be found in the copy furnished the defendant. *State v. Green*, 631.

SEE MURDER, 4.

NEGLIGENTLY COMPOUNDING MEDICAL  
RESCRIPTION.

POOR PERSON.

SEE PRACTICE, 6.

POWERS.

**EXECUTION OF TESTAMENTARY POWERS: STATUTE CONSTRUED.** A power to sell land and invest the proceeds of sale conferred by a will may, under the statute, (Wag. Stat., p. 93, § 1,) be executed by an administrator with the will annexed, the donee of the power having refused to execute it. *Evans v. Blackiston*, 437.

PRACTICE.

1. **REMARKS OF JUDGE IN PRESENCE OF JURY.** When illegal evidence has been admitted without objection, a remark made by the trial judge in the presence of the jury that if objection had been made he would have excluded it, cannot be assigned for error. *Nelson v. Foster*, 381.
2. **DAMAGES: WHEN NOT SO EXCESSIVE AS TO AUTHORIZE REVERSAL.** A judgment will not be disturbed on the ground of excessive damages, where the right to recover damages was clearly established, and it does not appear that the sum assessed is so disproportionate to the injury as to bear marks of passion, prejudice or corruption on the part of the jury. *Graham v. Pacific R. R. Co.*, 536.
3. **EQUITY PRACTICE: VENDOR'S LIEN: CROSS-BILL: HARMLESS ERROR OF TRIAL COURT.** In a suit to enforce a vendor's lien, the answer, after denying the alleged indebtedness, pleaded specially that plaintiff agreed to receive lands in Kansas as part payment of the purchase



money, tendered a deed, and prayed specific performance. The reply admitted a contract for purchase of the Kansas lands, but charged that this was a separate transaction, having no connection with the first. On this issue the trial court found for the plaintiff; in which finding this court, upon an examination of the evidence, concurred. The trial court, after all the evidence had been heard, dismissed that portion of the answer pleading the contract to pay in lands, treating it as a cross-bill; *Held*, that this was error; that this portion of the answer was pleaded as a part of the main transaction, and as a defense to plaintiff's action, and that the prayer for specific performance of that contract was in substance a prayer that the court would effectuate the main contract of the parties, as understood by defendant, and, as such, that there was no necessity for the dismissal; but, as the judgment would have been the same, whether this portion of the answer were dismissed or not, there was no such error as would justify a reversal of the judgment. *Olney v. Eaton*, 563.

4. EVIDENCE OF CHARACTER. When a witness has testified that the character of another witness for truth and veracity is bad, it is discretionary with the trial court to admit or reject further testimony from the same witness to prove his general moral character also to be bad. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.
5. ADDRESS TO THE JURY. The court again condemns the conduct of attorneys who travel out of the record in addressing the jury, and make statements of fact which there is no evidence tending to prove. *Ib.*
6. POOR PERSON: SECURITY FOR COSTS. An order, allowing the plaintiff to sue as a poor person, is, in effect, revoked by a subsequent order requiring him to give security for costs, and the absence of a formal order of revocation is not such an irregularity as will justify an appellate court in reversing the judgment of dismissal by the trial court for failure to furnish such security. *Kelly v. Valle*, 601.

SEE LACHES, 2.

MASTER AND SERVANT, 1.

PARTIES, 3.

#### PRACTICE, CRIMINAL

1. CONDUCT OF PROSECUTING ATTORNEY. Neither the act of the prosecuting attorney in conferring with a witness for the defense, in relation to the case, nor his statement in argument to the jury that the murder was admitted by defendant were held, in the present case, sufficient to justify a reversal of the judgment. *The State v. Wieners*, 13.
2. WHAT CONSTITUTES MISCONDUCT OF THE JUDGE AT THE TRIAL: JUROR CANNOT IMPEACH THE VERDICT. After the jury had retired to consider of their verdict in a criminal case, one of their number sent a note to the judge who presided at the trial, asking advice concerning the case, to which the judge made answer in writing. He also held a conversation with a juror as to how the jury stood upon

the question of conviction, and permitted a bailiff to tell him, without rebuke, how they were divided. All these things were done in the absence of the prisoner and his counsel. *Held*, that they constituted a case of misconduct on the part of the judge, which entitled the defendant to a new trial. *Held*, also, that the juror was not a competent witness to impeach the verdict. *State v. Alexander*, 148.

3. ATTORNEY'S ARGUMENT. A court should not permit an attorney, either in a civil or criminal case, to state in his argument to the jury material facts of which no evidence has been given. *The State v. Lee*, 165.
4. INDICTMENT CONTAINING SEVERAL COUNTS: MOTION TO COMPEL THE STATE TO ELECT. When there are several counts in an indictment, a motion to compel the State to elect on which count the case shall be tried, is addressed to the sound discretion of the trial court, and the Supreme Court will not interfere with its ruling, unless it is clear that the discretion has been abused to the injury of the accused. *State v. Green*, 631.
- 4.<sup>a</sup> THANKSGIVING DAY: SUNDAY: COMPUTATION OF TIME. Thanksgiving day, although by statute a public holiday, and, for certain purposes, considered to be the same as Sunday, is properly counted as part of the 48 hours within which the defendant is required to make his challenges, after he is furnished with a list of jurors; in computing statute time, Sunday itself should be counted unless expressly excepted. *Ib.*
- 6 JURY: WAIVER OF FULL PANEL. A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether he may waive his right of his own motion, and without suggestion from the other side, *quære?* *The State v. Davis*, 684.

SEE WAIVER, 1.

#### PRACTICE IN THE SUPREME COURT.

1. EVIDENCE. A judgment will not be reversed because of the admission of improper evidence upon the trial, where it was introduced and read without objection; nor where, if reversed, the evidence would be competent upon a subsequent trial. *Wayne County v. St. Louis & Iron Mountain R. R.*, 77.
2. BILL OF EXCEPTIONS. The Supreme Court will not consider objections to the competency of a juror, when the only evidence impeaching him consists of an affidavit attached to the record, but not copied in the bill of exceptions, or otherwise shown to have been before the trial court, when the question of competency was presented to that court. *The State v. Treace*, 124.

SEE HABEAS CORPUS, 2.

## JURISDICTION, 2

JACHES, 2.

## PRESUMPTION.

SEE COUNTY BONDS, 1.

## PRINCIPAL AND AGENT.

1. EVIDENCE: DECLARATIONS OF AGENT. Declarations of a person assuming to act as agent of another, are not admissible in evidence to prove his agency, but, after a *prima facie* case of agency is proven against the principal, declarations made by the agent in the prosecution of and relative to the business contemplated by such agency, are admissible against the principal; declarations, however, made to third parties, by the person alleged to be an agent, tending to disprove the fact of such agency, are not admissible in favor of the person alleged to be his principal. *Peck v. Ritchey*, 114.
2. WITHIN WHAT TIME REPUDIATION OF UNAUTHORIZED ACTS OF AGENT MUST BE MADE. An instruction that the principal, wishing to repudiate the unauthorized acts of one assuming to act as his agent, should do so upon learning the fact, or, certainly, within a few days, was held to be erroneous, and that the words "within a reasonable time," or "as soon thereafter as he can," or equivalent words, should have been substituted for "within a few days." *Ib.*
3. POWERS OF CASHIER AND FINANCIAL AGENT. One who is authorized to act as cashier and financial agent of a firm which is in the habit of taking commercial paper in the transaction of its business, has authority to indorse such paper in the name of the firm. *Edwards v. Thomas*, 468.
4. SCOPE OF AGENCY: HOW SHOWN. The authority of an agent to act in a given manner, may be inferred from the mere fact and the nature of his employment, or from long continued and repeated acts of acquiescence by his employer. *Ib.*
5. STATEMENTS OF AGENT. Third persons have a right to rely upon the statements of an agent as to the existence of such extrinsic matters relating to his agency as lie within his own peculiar knowledge. *Ib.*
6. UNAUTHORIZED ACCOMMODATION PAPER: RIGHTS OF PURCHASER: NOTICE. As against a purchaser of negotiable paper endorsed by an agent in the name of his principal, it is no defense that the endorsement was made, not for the benefit of the principal but for the accommodation of a third party, unless the purchaser took with notice of that fact. Positive and direct testimony is not necessary to charge him with notice; it may be inferred from facts proven; but mere circumstances sufficient to put a prudent man on inquiry will not do. The fact that the name of the party accommodated appears or

the paper as last endorser does not, as matter of law, impart such notice. *Ib.*

SEE RAILROADS, 17.

### PRINCIPAL AND SURETY.

1. SUBROGATION: RIGHTS OF SURETIES ON AN ADMINISTRATOR'S BOND WHO HAVE PAID DEBTS OF THE ESTATE. An administrator having failed to collect and pay over the purchase money of land sold by him to pay a debt which had been allowed against the estate of his decedent, was sued by the creditor on his bond, and his sureties were compelled to pay the debt. In a suit by the sureties to have the administrator's deed to the land set aside as fraudulent and themselves subrogated to the rights of the creditor, and for general relief, the deed was set aside, and it was *Held*, 1st, That they were entitled to have the benefit of the creditor's allowance, and that the proper mode of enforcing their right was to procure an order of the probate court for the sale of the real estate of the deceased to satisfy that allowance; 2nd, That they were not entitled to have the probate court allow as a claim against the estate of the deceased a judgment which they had obtained against the administrator for the amount of the debt paid by them, together with costs and expenses incurred in resisting payment. *Wernecke v. Kenyon's Admr.*, 275.
2. EXECUTOR'S FINAL SETTLEMENT CONCLUSIVE ON HIS SURETIES. An order of the probate court made upon a final settlement, ascertaining a balance to be due from an executor and directing him to pay it over, is conclusive against his sureties in an action on his bond, (*following State v. Holt*, 27 Mo. 340; *State v. Rucker*, 59 Mo. 17); *Dix v. Morris*, 514

### PROBATE AND COMMON PLEAS COURT OF GREENE COUNTY.

1. This court was not abolished by the constitution of 1875. *State v. Hart*, 208.
2. ON APPEAL FROM THE PROBATE AND COMMON PLEAS COURT OF GREENE COUNTY, the circuit court can try a case only as an appellate court, upon errors assigned, and not *de novo*, (*following McCraw v. Hubble*, 61 Mo. 107.) *Boone's Admr. v. Shackleford's Admr.*, 493.

### PROBATE JURISDICTION.

STATUTE CONSTRUED. In a county in which a probate court is established, having by statute exclusive original jurisdiction "to hear and determine all suits and other proceedings instituted against executors or administrators upon any demand against the estate of their testator, or intestate," the circuit court has no jurisdiction to enter a money judgment against the estate of a deceased person, or to charge the lands of the estate with the payment of such judgment. *Wernecke v. Kenyon*, 275.

## PROMISSORY NOTE.

1. POWER OF ADMINISTRATOR TO OBTAIN EXTENSION OF NOTES. An administrator has the legal power to contract for the extension of the time of payment of a note executed by his testator, so long as it is not barred under the administration law. *North v. Walker's Admr.*, 453.
2. INTEREST. Where a note called for ten per cent. interest after maturity, and the time of payment was extended by agreement for a certain time at the rate of nine per cent.; *Held*, that after the expiration of the extended time the note would bear interest at the rate of ten per cent. *Ib.*
3. UNAUTHORIZED ACCOMMODATION PAPER: RIGHTS OF PURCHASER: NOTICE. As against a purchaser of negotiable paper endorsed by an agent in the name of his principal, it is no defense that the endorsement was made, not for the benefit of the principal, but for the accommodation of a third party, unless the purchaser took with notice of that fact. Positive and direct testimony is not necessary to charge him with notice; it may be inferred from facts proven; but mere circumstances sufficient to put a prudent man on inquiry will not do. The fact that the name of the party accommodated appears on the paper as last endorser does not, as matter of law, impart such notice. *Edwards v. Thomas*, 468.
4. NOTICE OF PROTEST. It is the duty of the holder of dishonored paper to direct the notary where and to whom to send notice of protest; and if one holding such paper endorsed by a firm, knows that the former manager of the business of the firm has been displaced by another, but fails to inform the notary of the change, and the notary gives notice of protest to the former manager at the old place of business, as he had done on a previous occasion, such notice is insufficient to bind the firm, notwithstanding the failure of the new manager to give notice that the business of the firm is no longer conducted at that place, and to remove the old sign of the firm. *Ib.*

SEE CONSIDERATION, 1, 2.

CONTRACT, 9.

COUNTY BONDS.

PERJURY.

PRINCIPAL AND AGENT, 3.

## PROTEST

SEE PROMISSORY NOTE, 4.

## PURCHASER WITH NOTICE

SEE NOTICE, 2.



## PROMISSORY NOTE, 3.

## RAILROAD.

1. RAILROAD CONSOLIDATION: STATUTE CONSTRUED. The act of March 15th, 1871, (Sess. Acts, p. 66,) left it optional with the Atlantic & Pacific Railroad Company, and the South Pacific Railroad Company, to consolidate, or not, as they chose. Failure of the companies to file with the Secretary of State the certificate required by the second section of that act, did not affect the validity of the conveyance by which, before the passage of the act, the South Pacific Company transferred to the other all its property, rights and franchises. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.
2. RIGHT OF INDIVIDUALS AND THE STATE TO DISPUTE THE EXERCISE OF CORPORATE FRANCHISES. Individuals may resist the condemnation of their lands for a right of way for a railroad, after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road after the expiration of that time, over a right of way already acquired; and a city is an individual within the meaning of this rule, so that where a railroad company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets, on the ground that the time limited by charter for the completion of the road has expired. The State alone can proceed against the company to arrest the work on that ground. *Ib.*
3. BRANCH RAILROADS: CHARTER LIMITATIONS AS TO TIME OF BUILDING. A railroad company was authorized, by its charter, to build a main line and branches, and was required to complete its road within seventeen years from the date of the charter; *Held*, that this limitation did not apply to the building of branch roads, at least so as to prevent the company from building a branch road over a right of way acquired before the expiration of that period. *Ib.*
4. BRANCH RAILROADS. A railroad company having a power to build branches, may, under that power, build a line commencing near one of its termini, and running in the same general direction with the main line, so as to form practically an extension of the main line. *Ib.*
5. ESTOPPEL AGAINST EXERCISE OF CORPORATE POWERS: MUNICIPAL POWER OVER STREETS: LICENSE. A railroad company which has, by its charter, a general power to build its road along or across the streets of a city, is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city authorities, an ordinance permitting it to lay and use a track on that street for a limited time, and has actually laid and used it, as permitted by the ordinance. The city has no power to authorize the use of any street for a railroad. Such an ordinance is, therefore a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license. *Ib.*
6. If a railroad company, having built a track upon a street of a city

under a license from the city, subsequently tears up the track and surrenders possession of the street to the city, the fact that it has once accepted such license will not estop it from asserting a power to build on that street, which was given by its charter, and was in existence when it accepted the license. *Ib.*

7. **RAILROADS: ACCEPTANCE OF STATUTORY PRIVILEGES.** An act passed in 1864, (Sess. Acts, p. 478,) authorized several railroad companies to connect their lines, and for that purpose granted them certain privileges. No time was prescribed within which the companies should accept the act. The connection was made in 1873; *Held*, that this was an acceptance of the act, and that the acceptance was in time. *Ib.*
8. **SECTION 27, ARTICLE 4, CONSTITUTION OF 1865,** which provided that "the General Assembly shall not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town," was prospective in its operation only, and did not repeal an act in force at the time of the adoption of the constitution, giving such a right. *Ib.*
9. **NON-LIABILITY FOR CATTLE DROWNED ON COMPANY'S LAND.** The forty-third section of the Railroad Law, (Wag. Stat., p. 310, § 43,) imposes upon a railroad company no liability to the owner of cattle accidentally drowned in an unenclosed well situated on the company's right of way, notwithstanding the loss is occasioned by the failure of the company to erect and maintain proper fences as required by that section. *Hughes v. Hannibal & St. Joseph R. R. Co.*, 325.
10. **UNENCLOSED LANDS: PROPRIETOR NOT LIABLE FOR ACCIDENTAL INJURY TO CATTLE COMING UPON THEM.** The proprietor of unenclosed land is under no obligation to make it safe for pasturage, and if the cattle of another stray upon it and are killed by drowning in an unguarded well, there is no liability resting upon him for the loss. A railroad company stands upon the same footing as any other proprietor. *Ib.*
11. **PASSENGER, RIGHTS OF: "STOCK PASS."** A passenger who presents to the conductor a "stock pass" from the railroad company which entitles him to return on their road without payment of fare, can recover damages sustained by him, when so returning, caused by his expulsion from the cars by the conductor for non-payment of the fare, although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes, and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return. *Graham v. Pacific R. R. Co.*, 536.
12. **WHERE a passenger had the right under a "stock pass," to return on defendant's cars from St. Louis to Knob Noster, and was actually on the return trip;** *Held*, that under the pass he had the right to stop at Eureka, an intermediate station, and was not liable to pay fare to the latter place. *Ib.*
13. **DAMAGES, COMPENSATORY AND EXEMPLARY.** A passenger can only recover for a wrongful expulsion from the car of a railroad company, such damages as he has actually sustained, and which he could not

have averted by reasonable exertion, care and prudence, unless he was ejected in a wanton, rude or aggravated manner, indicating oppression, malice or a desire to injure, in which case, he may recover punitive or exemplary damages from the company, where, after knowledge of the fact, they retain in their employ, and in the same capacity, the servant who has been guilty of such misconduct. *Ib.*

14. FORTY-THIRD SECTION OF THE RAILROAD LAW: NEGLIGENCE. In an action under the 43rd section of the railroad law (Wag. Stat., p. 310), there can be no recovery for injuries resulting from the negligent management of a train, (*following Cary v. St. L., K. C. & N. Rwy. Co., 60 Mo. 209.*) *Edwards v. Hannibal & St. Jo. R. R. Co., 567.*
15. RAILROAD FENCES: STATUTES CONSTRUED. The 43rd section of the railroad law does not require railroad companies to erect and maintain fences within the limits of incorporated towns.  
The 5th section of the damage act (Wag. Stat., p. 520), does not require them to fence anywhere; but simply dispenses with proof of negligence in the first instance when animals are killed where there are no fences, but where fences might lawfully have been erected. *Ib.*
16. LIABILITY UNDER THE STATUTE FOR KILLING STOCK. A railroad company is not liable under the 43d section of the railroad law (Wag. Stat., p. 310), for stock killed upon its track within the limits of an incorporated city. *Cousins v. Hann. & St. Jo. R. R. Co., 572.*
17. MASTER AND SERVANT: PLEADING. A railroad company is not liable under the 5th section of the damage act, (Wag. Stat., p. 520,) for stock killed by one of its locomotives which was at the time being used by a servant of the company without authority, for his own purposes and outside of the line of his employment.  
This defense need not be specially pleaded, but may be given in evidence under the general issue. *Ib.*
18. DUTY OF CONDUCTOR IN EJECTING PASSENGER. If one goes upon a railroad train intending, in good faith, to become a passenger, the conductor, while he has the undoubted right to put him off if the rule of the company prohibits the carrying of passengers on that train, has no right for that reason to eject him violently, or in such a manner as to imperil his life, as by pushing or ordering him off while the train is in motion, and if he does, the company is responsible in damages for any resulting injury. *Brown v. Hannibal & St. Joseph R. R. Co., 588.*
19. DISEASE AS AFFECTING COMPANY'S LIABILITY FOR PERSONAL INJURIES. The liability of a railroad company for a violent ejection of a passenger from its train, is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure. *Ib.*
20. STATUTORY LIABILITY FOR INJURIES TO ANIMALS. No action can be maintained, under the 43rd section of the railroad law (Wag., Stat., p. 310), for animals killed within the limits of a town or city; in such cases, where fences have not been, but might lawfully be erected, the action should be brought under section 5 of the damage act (Wag. Stat., p. 520), which dispenses with the proof of negli-

gence, or, the action should be brought at common law. *Elliott v. Hannibal & St. Joseph R. R. Co.*, 683.

21. **FENCES.** Where, within the limits of a town or city, lands dedicated to public use, and crossing or abutting upon the right of way of a railroad company, are occupied and used for farming purposes, such occupancy does not make it lawful for the railroad company to fence across them, and its failure to do so will not subject it to liability under the 5th section of the damage act. *Id.*

SEE COUNTY BONDS, 1.

### RAPE.

**ASSAULT TO RAPE.** An indictment under section 32, p. 449, Wag. Stat., for an assault with intent to commit a rape upon a female child under the age of twelve years, need not contain the word "ravish." *State v. Jaeger*, 173.

### RAVISH.

SEE RAPE, 1.

### REAL PROPERTY.

**LIABILITY OF EXECUTOR ADMINISTERING ON REAL ESTATE.** Although the general principle is that the realty descends to the heir, and the executor has nothing to do with it, except in case of deficiency of assets; yet, when, as matter of fact, he assumes control of it and collects the rents, or when the will gives him authority to sell, and he exercises the authority, he is liable on his bond as executor, if he fails to account for the rents or for the proceeds of sales. *Dix v. Morris*, 514.

SEE LANDS AND LAND TITLES.

### REASONABLE DOUBT.

SEE MURDER, 7, 9, 12.

### RECITAL.

SEE EVIDENCE, 19.

### RECORDS.

SEE EVIDENCE, 2.

## REMOVING CLOUD ON LAND TITLES

SEE EQUITY, 2.

## RESCISSION.

1. RESCISSION FOR MISREPRESENTATION. Erroneous representations as to the title to land made by a vendor without fraud pending the negotiation for a sale, will not authorize a rescission of the contract, if the vendee has received a warranty deed, and has taken and continued to retain possession without opposition. *Key v. Jennings*, 356.
2. RESCISSION FOR MISDESCRIPTION. Misdescription of land in a deed, will not authorize rescission of the contract of sale, when it appears that the vendee has been put into possession of the very land which he intended to buy and the vendor intended to sell, and that he has for several years retained undisputed possession; nor when the vendor offers to deliver a deed correctly describing the land. *Ib.*
3. RESCISSION MUST BE CLAIMED IN A REASONABLE TIME. When a vendee of land is entitled to have his purchase rescinded by reason of defects in the title to the land, he must exercise his right within at least a reasonable time after discovering the defects. *Ib.*
4. PARTIAL FAILURE OF TITLE. A purchase was made of a farm containing 1,269 acres, as to two 40-acre tracts of which there was a failure of title, but it appeared that these tracts were on the outer sides of the farm, and did not destroy its contiguity, or form any special inducements to the purchase, and that the vendor was solvent; *Held*, that as the substance of the contract of purchase was executed without these tracts, the purchaser's remedy for the failure of title thereto was not the rescission of the contract, but a claim for compensation against the vendor. *Ib.*

## SALE.

SEE CAVEAT EMPTOR.

DEEDS OF TRUST, 1, 3, 4.

## SCHOOLS.

1. POWER OF SCHOOL DIRECTORS TO MAKE RULES: LIABILITY FOR ENFORCING THEM. The school law (W.S., p. 1264, § 8), provides that the board of directors "shall have power to make and enforce all such needful rules and regulations for the government, management and control of the schools and their property as they shall think proper \* \* not inconsistent with the laws of the land." A board of directors having made a rule that no pupil should, during the school term, attend a social party, the plaintiff, a pupil of the school, by the permission of his parents, violated the rule, and was expelled from the school for so doing. In an action against the directors to



recover damages for the expulsion, *Held*, 1st, that under the law, they had the power to make needful rules for the government of pupils while at school, but no power to follow them home and govern their conduct while under the parental eye; that in prescribing the foregoing rule they had gone beyond their power, and had invaded the rights of the parents; but, 2nd, as there was no malice, oppression or willfulness on the part of the directors, they were not liable in damages. *Dritt v. Snodgrass*, 286.

2. NORMAL SCHOOL APPROPRIATIONS: ESTOPPEL: SEC. 19, ART. 10, CONSTITUTION OF 1875, abrogated the continuing appropriations for the State Normal Schools made by the act of 1875, (Sess. Acts, p. 78). In January, 1877, without any law authorizing it, the Normal School at Kirksville, drew from the State treasury \$5,000, the amount to which it had been entitled under the act of 1875. In the following April the Legislature appropriated \$7,500 for the school, for the fiscal year 1877. In mandamus proceedings by the Treasurer of the school to compel the State Auditor to draw a warrant on the State Treasury for the full amount appropriated by the latter act; *Held*, 1st, That the relator was estopped to deny the legality of the payment made to him in January; 2nd, That that payment was to be applied upon the appropriation for the year, and the relator was entitled only to a warrant for \$2,500. *The State ex rel. Baird v. Holaday*, 385.

#### SECRETARY OF STATE.

SEE PARDON, 3.

RAILROAD, 1.

#### SELF-DEFENSE.

SEE MURDER, 8.

#### SHERIFF.

1. CONFLICTING EXECUTIONS: SHERIFF'S DUTY: MEASURE OF DAMAGES. Although a sheriff having property in his possession by virtue of a writ of attachment from a court of competent jurisdiction, has no right before the determination of the attachment suit, to sell the property under an execution from a co-ordinate court, issued upon a judgment of foreclosure of a mortgage obtained by another party in a suit begun after the levy of the attachment, yet if he does sell in a case where the mortgage was recorded before the attachment was levied, and is for an amount greater than the value of the property, he will be liable to the attaching plaintiff in nominal damages at most. *Metzner v. Graham*, 653.
2. SALE UNDER EXECUTION: SHERIFF'S POWER TO AMEND DEED. When a sheriff has executed a deed in pursuance of a sale under execution, conveying land by the same description by which it was advertised and sold, his power is at an end. He cannot afterwards

execute another deed conveying by a different description the land which he intended to sell, and which the bidders at the sale understood was being sold. *Ware v. Johnson*, 662.

SEE GRAND JURY.

SHOOTING.

SEE NEGLIGENCE, 1.

SPECIAL JUDGE.

SEE COURTS, 3.

SPECIAL TAXES.

1. PLEADING: PETITION ON SPECIAL TAX BILL. A petition on a special tax-bill sufficiently complies with a provision in a city charter that "it shall be sufficient for plaintiff to plead the making and issue of the tax bill sued on, giving the dates and contents thereof," when it contains the substance of the bill; the bill need not be copied in the petition. *Hunt v. Hopkins*, 98.
2. NO PERSONAL JUDGMENT can be rendered against the owner of real estate for street improvements, made in front of his premises by the city (following *St. Louis v. Allen*, 53. Mo. 44). *City of Louisiana v. Miller*, 467.

SPECIFIC PERFORMANCE.

FOREIGN LANDS. The specific performance of a contract for the sale of lands lying in another State, will be decreed in equity, whenever the party is resident within the jurisdiction of the court. *Olney v. Eaton*, 563.

SPITTING OF BLOOD.

SEE INSURANCE, 3.

STATUTES.

1. RAILROADS: ACCEPTANCE OF STATUTORY PRIVILEGES. An act passed in 1864 (Sess. Acts, p. 478), authorized several railroad companies to connect their lines, and for that purpose granted them certain privileges. No time was prescribed within which the companies should accept the act. The connection was made in 1873; *Held*, that this was an acceptance of the act, and that the acceptance was in time. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.

2. **INTERPRETATION OF STATUTES.** When the words of a statute are so ambiguous as to create a doubt as to their true meaning, recourse may be had to the occasion of the provision, the mischief complained of and the remedy sought to be applied by the law maker. When the intent has been ascertained, it may be followed, though not strictly according to the letter of the act. *State ex rel. Meinzer v. Diveling*, 375.
3. **CONSTITUTIONALITY OF LAWS.** The courts are warranted in declaring an act of the Legislature void only where there is a clear conflict between it and the constitution. *In the Matter of Burris*, 442.

SEE CONSTITUTIONAL LAW, 4.

CONTRACT, 2.

#### STATUTES CONSTRUED.

##### WAGNER'S STATUTES OF 1872.

Page 89, §§ 48, 49, See Administration, 1.  
 Page 93, § 1, See Powers, 1.  
 Page 102, §§ 2, 6, See Administration, 6, 7.  
 Page 125, § 7, See Deed of Trust, 7.  
 Page 193, §§ 60, 61, See Attachment, 1.  
 Page 310, § 43, See Fences, 1, 3, 4, 5.  
 Page 445, § 1, See Murder 1, 2, 15.  
 Page 446, § 2, See Murder, 1, 2.  
 Page 447, § 18, See Criminal Law, 1.  
 Page 516, § 33, See Felony, 1.  
 Page 520, § 5, See Fences, 3, 4, 5.  
 Page 520, § 5, See Railroad, 15, 17.  
 Page 573, § 57, See Election, 1.  
 Page 698, § 7, See Homestead, 1.  
 Page 886, § 1, See Champerty.  
 Page 895, § 6, See Larceny, 2.  
 Page 1034-6-7, §§ 6, 19, 20, See Judgment, 4.  
 Page 1054, §§ 13, 15, See Attachment, 1.  
 Page 1091, § 31, See Larceny, 3.  
 Page 1264, § 8, See School, 1.  
 Page 1372, § 1, See Witness, 3.

##### REVISED STATUTES OF 1855.

Page 1554, § 1, See Deed of Trust, 2.

##### REVISED STATUTES OF 1825.

Page 328, § 8, See Descent.  
 Page 527, See Husband and Wife, 4.

##### TERRITORIAL LAWS.

Pages 66, 83, See Husband and Wife.

##### ACTS OF 1877.

Page 241, See Larceny, 2.  
 Page 261, See Habeas Corpus, 1, 2.

##### ACTS OF 1871.

Page 66, See Railroad, 1.

##### ACTS OF 1864.

Page 78, See Railroad, 8.

#### STATUTE OF FRAUDS.

1. No action can be maintained to recover back money or property, which has been paid upon a verbal contract for the purchase of land, if the vendor is willing to execute the contract on his part. *Galway v. Shields*, 313.
2. **CASE ADJUDGED.** In an action for the value of goods sold and delivered, no recovery can be had, if it appears that such goods were delivered pursuant to a verbal agreement that the price therefor was to be paid in specific land to be conveyed by the buyer to the seller, and the buyer has offered and is ready and willing to comply with his part of the agreement. *Ib.*

## STOCK PASS.

SEE RAILROAD, 11, 12.

## STOLEN PROPERTY.

SEE LARCENY, 1.

## STREETS.

**STREET IMPROVEMENTS.** The engineer of a city which has power by its charter to provide, by ordinance, for the construction and repair of sidewalks, has no authority to order a sidewalk to be built without an ordinance. *City of Louisiana v. Miller*, 467.

SEE MUNICIPAL CORPORATION, 1, 2, 3.

## SUBROGATION.

**RIGHTS OF SURETIES ON AN ADMINISTRATOR'S BOND WHO HAVE PAID DEBTS OF THE ESTATE.** An administrator having failed to collect and pay over the purchase money of land sold by him to pay a debt which had been allowed against the estate of his decedent, was sued by the creditor on his bond, and his sureties were compelled to pay the debt. In a suit by the sureties to have the administrator's deed to the land set aside as fraudulent and themselves subrogated to the rights of the creditor, and for general relief, the deed was set aside, and it was *Held*, 1st, That they were entitled to have the benefit of the creditor's allowance, and that the proper mode of enforcing their right was to procure an order of the probate court for the sale of the real estate of the deceased to satisfy that allowance; 2nd, That they were not entitled to have the probate court to allow as a claim against the estate of the deceased a judgment which they had obtained against the administrator for the amount of the debt paid by them, together with costs and expenses incurred in resisting payment. *Wernecke v. Kenyon's Admr.*, 275.

## SUNDAY.

SEE PRACTICE, CRIMINAL, 5

## TAXES AND TAXATION.

1. **LANDLORD AND TENANT: CONTRACT: TAXES.** Where by the terms of a lease the lessee was entitled, from time to time, to deduct from the rental all taxes imposed upon the leased property, which the lessee either had paid or might be liable to pay, and there was at the time no law imposing a personal liability for taxes on any one, but any taxes levied upon the property were a lien upon it; *Held*, that the stipulation amounted to an appropriation of a reserved fund out of the rental to the payment of the taxes. *McPherson v. Atlantic and Pacific Railroad Co.*, 103.

2. SECTION 30, ART. 1, CONSTITUTION OF 1865, which provided that "all property subject to taxation ought to be taxed in proportion to its value," while it enjoined a uniform rule in imposing taxes on property, did not abridge the power of the Legislature to provide revenue from other sources, (*following Glasgow v. Rowse*, 43 Mo. 479). *American Union Express Company v. City of St. Joseph*, 675.
3. MUNICIPAL POWERS OF TAXATION: UNIFORMITY AND EQUALITY. A city which is authorized by its charter to license, tax and regulate merchants, agents, express companies, insurance companies, &c., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city, and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike. *Ib.*
4. STATE TAXATION ON RECEIPTS OF EXPRESS COMPANIES, NO INFRINGEMENT ON POWER OF CONGRESS TO REGULATE COMMERCE. A tax levied by State authority upon the gross receipts of an express company, whose business consists in receiving goods to be delivered at points outside of the State, to which the company's line does not extend, is not a violation of that provision of the constitution of the United States which confides to Congress alone the power to regulate commerce with foreign nations and among the several States, (*following Erie R. R. Co. v. Pennsylvania*, 15 Wall. 284). *Ib.*
5. MUNICIPAL TAX ON EXPRESS COMPANIES: ESTOPPEL. A tax imposed by city ordinance upon the gross receipts of an express company as a compensation for the transaction of its business in the city, is properly collected from the gross earnings without deduction for expenses incurred in conducting the business.  
If a part of the gross receipts have been paid out to other companies as their *pro rata* for carrying freight, although in strictness the amounts so paid may not be liable to taxation under the ordinance, yet when they are embraced in the return made by the company itself, and the tax has been paid on the whole, though under protest, it cannot be recovered back. *Ib.*

SEE EQUITY, 7.

NOTICE, 1.

TENDER.

OBLIGATION PAYABLE IN MERCHANDISE: TENDER. A merchant having an established place of business executed a contract for the payment of money in one year after date, but containing a stipulation that it should be "payable in merchandise to be taken during the year." *Held*, that he was under no obligation to tender the merchandise. Readiness on his part at his place of business whenever called upon by the creditor, to perform the contract, prevented any default being attributed to him. It was the duty of the creditor to select and take at his place of business such articles as he desired. *Lakey v. Chadwick*, 622.



## THANKSGIVING DAY.

**THANKSGIVING DAY: SUNDAY: COMPUTATION OF TIME.** Thanksgiving day, although by statute a public holiday, and, for certain purposes, considered to be the same as Sunday, is properly counted as part of the 48 hours within which the defendant is required to make his challenges, after he is furnished with a list of jurors; in computing statute time, Sunday itself should be counted unless expressly excepted. *State v. Green*, 631.

## TIME.

SEE THANKSGIVING DAY

## TORTS.

1. **CHARGE OF UNLAWFUL SHOOTING, SUSTAINED BY PROOF OF NEGLIGENT SHOOTING.** Under the present practice, proof of a negligent or careless shooting will sustain an allegation of an unlawful and wrongful shooting; the same was true, at common law, where an action of trespass for assault and battery was the proper form of action for direct injuries negligently and carelessly inflicted, as well as for those that were intentional and malicious. *Conway v. Reed*, 346.
2. **PERSONAL INJURIES: PRIMA FACIE CASE.** In an action for damages, sustained from injuries caused by an unlawful and wrongful assault and shooting, plaintiff is *prima facie* entitled to a verdict upon proof that he was shot by defendant; it then devolves upon the defendant to show that the shooting occurred without fault on his part, or to put in evidence mitigating facts; it is not necessary that plaintiff, in the first place and by direct evidence, should show either an intention to commit the injury or that defendant was in fault. *Ib.*
3. **INFANT: LIABILITY FOR TORTS.** An infant is liable for a tort in the same manner as an adult. *Ib.*

## TRUSTS AND TRUSTEES.

1. **SUBSTITUTION OF TRUSTEES IN A DEED OF TRUST.** It is not necessary to the validity of proceedings under Rev. Stat. 1855, p. 1554, § 1, for the appointment of the sheriff to act as trustee in executing a deed of trust given to secure the payment of a debt in place of the person therein named as trustee, that the latter shall have signed the deed or otherwise signified his acceptance of the trust; nor is notice of the proceeding required to be given to the trustor. *Martin v. Paxson*, 260.
2. **LAND ENTRIES: RESULTING TRUSTS.** If one owning a government land-warrant issued in the the name of another, and not assigned by him, enters land under the warrant for himself, but for want of the assignment makes the entry in the name of the other, the latter takes the legal title to the land as trustee for the former. *Key v. Jennings*, 356.

SEE NOTICE, 2.

## UNCLE AND NEPHEW

SEE INSURANCE, 2.

## UNENCLOSED LANDS.

SEE FENCES, 1, 2.

## UNITED STATES COLLECTOR'S NOTICE OF SALE.

**SUCCESSION TAX: COLLECTOR'S NOTICE OF SALE.** When the owner of land, on account of which a United States succession tax has been assessed, resides in the same collection district with the land, but not upon it, a collector's notice of seizure and sale of the same to pay the tax, is not lawfully served upon him by leaving a copy at the domicile on the land. *Peyrie v. Schreiber*, 38.

## UNITED STATES SUCCESSION TAX.

SEE NOTICE, 1.

## UNLAWFUL SHOOTING.

SEE NEGLIGENCE, 1.

## VARIANCE.

**MISNOMER OF INSTRUMENT SUED ON: VARIANCE.** In an action for breach of covenant for quiet enjoyment contained in an instrument designated in the petition as a lease, but of whose contents the defendant is fully apprised, if the instrument, when produced on the trial appears to be not a lease but a mining license, an amendment of the petition may properly be made, but there is no such variance between the allegation and the proof as to authorize a non-suit. *Boone v. Stover*, 430.

## VENDOR AND PURCHASER.

SEE CONSIGNOR AND CONSIGNEE.

RESCISSION, 1, 2, 3, 4.

## VENDOR'S LIEN.

1. **WAIVER OF VENDOR'S LIEN.** Defendant having sold a tract of land to one P., on the same day bought another tract of plaintiff. For the purchase money of the latter tract plaintiff received defendant's two notes, together with the proceeds of defendant's sale to P.,

which consisted in part of cash and in part of notes executed by P. Defendant conveyed his land to P., and received from plaintiff a title bond for the land bought of him. A year afterward defendant, at the instance and by the advice of plaintiff, by the payment of \$100 obtained from P., a mortgage on the land he had sold P. securing the payment of P.'s notes. Defendant's notes were paid, P. failed to pay his, and plaintiff foreclosed the mortgage, realizing a part of the debt only. In a suit to subject the land sold by plaintiff to defendant to the payment of the unpaid balance; *Held* that by advising and accepting the mortgage from P. plaintiff had waived any vendor's lien he might have had upon this land. *Anderson v. Griffith*, 44.

2. WHO ARE PROPER PARTIES TO A VENDOR'S LIEN SUIT. An administrator sold and conveyed several parcels of land, part of a larger tract, and received the purchase money for the same. His intestate had previously conveyed the entire tract to another party. In a suit by the administrator to enforce a vendor's lien against the entire tract for the purchase money due upon this sale: *Held*, that the purchasers at the administration sale were proper parties defendant. *Chapman, Admr. v. Callahan*, 299.
3. VENDOR'S LIEN: DEFENSE OF FRAUDULENT CONVEYANCE. To defeat such a suit, the purchaser at the administrator's sale may show that no debt was incurred by the grantee in the deed from the intestate, and for this purpose will be allowed to prove that this deed was made without consideration, and in order to hinder and defraud the creditors of the intestate. *Ib.*
4. ESTOPPEL BY PLEA: HUSBAND AND WIFE. A defendant in a vendor's lien case cannot, after a verdict against him upon a plea of payment, avail himself of evidence that he had never contracted to pay for the land, given upon an issue of non-assumpsit made between the plaintiff and other defendants in the case; and where husband and wife are defendants, and the husband has no other interest than as tenant by the courtesy in the land of which his wife is owner, a verdict so rendered affects his interest equally with hers, although he may, in a separate answer, have pleaded non-assumpsit, and, upon a trial, the plea may have been found in his favor. *Ib.*

SEE PRACTICE, 3.

#### VENUE.

1. CHANGE OF VENUE. A refusal of a judge to admit to bail a prisoner charged with murder, is no evidence that he has prejudged the case, so as to entitle the prisoner to a change of venue. *State v. Alexander*, 148.
2. CHANGE OF VENUE. The court to which a change of venue is granted, obtains jurisdiction of the cause when the order granting the same is made; and a direction to the clerk, contained in the order, that he transmit a transcript of the record to the clerk of the court, to which the venue is ordered, designating it by a wrong name will be rejected as surplusage. *State v. Daniels*, 192.

SEE COURTS, 3.

EJECTMENT, 1.

### VERDICT.

1. CONCLUSIVE UPON WEIGHT OF EVIDENCE. The verdict of the jury, upon the weight of evidence, is, in this court, regarded as conclusive in civil cases. *Fletcher v. Drath*, 126.
2. A VERDICT SET ASIDE AS AGAINST THE EVIDENCE. While the Supreme Court will not lightly interfere with the verdict of a jury even in a criminal case, yet when it owes its birth and being to prejudice rather than to evidence, the court will refuse to sanction it.  
In the present case the court, after examining the evidence in detail, sets aside the verdict and reverses the judgment of conviction. *The State v. Jaeger*, 173.

SEE JURY, 1.

### WAIVER.

1. RIGHT TO TRUE COPY OF INDICTMENT: WHEN WAIVED. The defendant has, under our statute, a right to a true copy of the indictment 48 hours before his trial, and, if an incorrect copy is furnished, he has the right to demand a true copy, and delay the trial until it is furnished; but, if he pleads without such copy, and makes no objection for want of it, he cannot after verdict, on that account, claim a new trial. (*Lisle v. State*, 6 Mo. 428, *followed*.) *State v. Green*, 631.
2. PRACTICE, CRIMINAL: JURY: WAIVER OF FULL PANEL. A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether he may waive his right of his own motion, and without suggestion from the other side, *quaere?* *The State v. Davis*, 684.

SEE VENDOR'S LIEN.

### WILLS.

1. DEVISEE AND EXECUTOR: EJECTMENT. Under the administration act, (Wag. Stat., 89, §§ 48, 49,) a devisee of real estate cannot maintain ejectment against one holding under a lease made by the executor of the deviser in obedience to an order of the probate court. The act expressly authorizes the executor to lease the real estate of his decedent, when so directed by competent authority, and the right of the devisee is subordinate to this. *Eoff v. Thompson*, 225.
2. EXECUTION OF TESTAMENTARY POWERS: STATUTE CONSTRUED. A power to sell land and invest the proceeds of sale, conferred by a will may, under the statute, (Wag. Stat., p. 93, § 1,) be executed by

an administrator with the will annexed, the donee of the power having refused to execute it. *Evans v. Blackiston*, 437.

3. **WILL: INSTRUCTION.** When, in a proceeding to contest the validity of a will, the real question is whether the testator was of sound mind at the time of signing, it is error to instruct the jury that the will is void if he was so feeble in mind or body that he was not able to see, and did not see the attesting witnesses sign. Such an instruction is calculated to confuse the jury and to withdraw their attention from the real issue. *Spoonemore v. Cables*, 579.
4. **REVOCATION OF WILL: INSTRUCTIONS.** When, in such a proceeding, evidence has been given tending to show that after the execution of the will, the testator made other provision for the principal devisee in lieu of that made in the will, the jury should be instructed as to what constitutes a revocation, and it is error to refuse a proper instruction on that subject. *Ib.*
5. **DECLARATIONS OF A TESTATOR** made after the execution of his will, tending to show that it was not satisfactory to him, and that he had made, or would make other dispositions of his property, are not admissible in evidence for the purpose of impeaching the will, (following *Gibson v. Gibson*, 24 Mo. 227, and *Cawthorn v. Haynes*, *Ib.* 237). *Ib.*

SEE ADMINISTRATION, 9

#### WITNESS.

1. **CONTRADICTORY STATEMENTS OF WITNESS.** Evidence of contradictory statements made by a witness in regard to his agency, is admissible to show the character of the witness, and to enable the jury to determine the credit to which he is entitled; and a witness cannot, either by his feigned or real forgetfulness of having made such contradictory statement, deprive a party of the right to such evidence; nothing but an admission by the witness that he made the very statement alleged will deprive the party of the right to prove it. *Peck v. Ritchey*, 114.
2. **THE CREDIT TO BE GIVEN TO HIM.** A witness is not to be disbelieved solely because he made statements out of court inconsistent with his testimony, nor is the converse of this proposition true; the jury are to determine the credibility of the witness from all the facts and circumstances in evidence. *Ib.*
3. **INCOMPETENCY OF A SURVIVING PARTY AS A WITNESS.** Where one of the original parties to the contract or cause of action in issue and on trial, is dead, the other is not a competent witness, even for the purpose of rebutting testimony given by the adverse party to show admissions made by himself since the death of the deceased. *Ring v. Jamison, Admr.*, 424.
4. **IMPEACHMENT OF WITNESS.** When, in a proceeding to contest the validity of a will, one of the attesting witnesses has sworn that he had no recollection of having signed the attestation in the presence or at the request of the testator, his affidavit made before the judge



of probate in favor of the will, and containing contrary statements, is admissible in evidence by way of impeachment, after his attention has been properly called to it. *Spoonemore v. Cables*, 579.

5. **DRUGGIST NOT A PRIVILEGED WITNESS.** A drug and prescription clerk may be compelled to testify what medicines he has furnished to a party to a suit, and it is error for the court to allow his claim of privilege when interrogated as to that matter. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.
6. **TESTIMONY FALSE IN PART: PROVINCE OF THE JURY.** If the jury believe that a witness has willfully sworn falsely as to any material fact, they are at liberty to disregard the whole of his evidence, as well those parts of it which may be corroborated by other evidence as those which are uncorroborated. *Ib.*

**SEE HUSBAND AND WIFE, 1.**

